BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
WASHINGTON, D.C.

Docket No. FMCSA-2015-0001
Notice of Proposed Rulemaking – Carrier Safety Fitness Determination

OPENING COMMENTS, EXHIBITS AND AFFIDAVITS OF A COALITION INCLUDING

Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT)
Air & Expedited Motor Carriers Association (AEMCA)
American Home Furnishings Alliance (AHFA)
Auto Haulers Association of America (AHAA)
National Association of Small Trucking Companies (NASTC)
The Expedite Alliance of North America (TEANA)
Transportation Loss Prevention & Security Association (TLP&SA)
Western States Trucking Association (WSTA)

Henry E. Seaton
SEATON & HUSK, L.P.
2240 Gallows Road
Vienna, VA 22182
Telephone: 703.573.0700
Fax: 703.573.9786
heseaton@aol.com

Mark J. Andrews
STRASBURGER & PRICE, LLP
1025 Connecticut Avenue, N.W.,
Suite 717
Washington, DC 20036
Telephone: 202.742.8601
Fax: 202.742.8691
mark.andrews@strasburger.com

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Affidavits

David Gee
Richard Gobbell
Garrett Martin
John Mueller
Tom Sanderson
Irwin Shires
Avery Vise

Supplemental Documents

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United States Court of Appeals for the District of Columbia Circuit /
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1. Petition for Review
2. Petitioners' Motion for Emergency Stay
3. Petitioners' Reply to Respondent's Opposition to Petitioners' Emergency Stay Motion
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B. ***ASECTT ET AL. V. FMCSA*** – Filed 07/16/2012
United States Court of Appeals for the District of Columbia Circuit /
USCA Case No. 12-1305

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3. Joint Appendix
4. Addenda to Brief 1-4
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C. Comments in response to "Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (SafeStat) and Implementation of a New Carrier Safety Measurement System (CSMS)" - FMCSA-2004-18898

D. Comments of ASECTT in response to "The FMCSA's 2011-2016 Strategic Plan: Raising the Safety Bar" - Docket No. FMCSA-2011-0098

E. Comments of ASECTT to Motor Carrier Safety Advisory Committee, July 28, 2011 Regarding Transport Topics July 4, 2011 Notice

F1-2. Comments of ASECTT in response to “Improvements to Compliance, Safety, Accountability (CSA) Motor Carrier Safety Measurement system (SMS)” / Docket No. FMCSA 2012-0074 – July 5, 2012

G. Comments of ASECTT before the Small Business Committee – July 11, 2012

H. Comments of ASECTT in response to “Motor Carrier Management Information System (MCMIS) Changes to Improve Uniformity in the Treatment of Inspection Violation / Data” – Docket No. FMCSA-2013-0457 – January 2, 2014

I. Comments of ASECTT in response to “Proposed Enhancements to the Motor Carrier Safety Measurement System (SMS) Public Web Site” / Docket No. FMCSA-2013-0392 – January 21, 2014

J. Comments of ASECTT and 8 Trade Associations in response to “Notification of Changes to the Definition of a High Risk Motor Carrier and Associated Investigation Procedures” / Docket No. FMCSA-2015-0439 – May 6, 2016

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I. Summary of Argument

This docket is a test. It is a test of the following issues:

- Whether the Federal Motor Carrier Safety Administration (FMCSA or the Agency) can repurpose its Safety Measurement System (SMS) with only superficial changes – as a new motor carrier safety fitness standard despite its use of a methodology condemned by Congress and criticized in almost six years of independent statistical studies;
- Whether the Agency can jump the gun on a Congressional mandate that SMS be reformed before it is used in a safety fitness rule;
- Whether the Agency can adopt a new safety fitness rule with proven disproportionate impacts that threaten the viability of smaller carriers;
- Whether hundreds of crash-free carriers can be shut down because their roadside inspection statistics in SMS *resemble* those of other carriers that did have crashes – thereby condemning the crash-free carriers through guilt by association.
- Whether a state-by-state patchwork of inconsistent roadside inspection practices – and the resulting mash-up of everything from paperwork infractions to out-of-service

violations into the highly malleable "severity weightings" and other convoluted formulas used in SMS – can provide any reliable or meaningful information about the safety of *individual* motor carriers;

- Whether this Agency's *initial* proposed application of SMS-based criteria to only a few carriers with the least favorable roadside inspection data can somehow be leveraged into a ratification of SMS methodology for *all* purposes – including expansion of motor carrier accident liability up the supply chain.

And this docket is a test of how much actual "notice" of the Agency's true intentions is required in a Notice of Proposed Rulemaking (NPRM) where, as here, only Delphic hints are provided about the practical implications of the proposed replacement of compliance reviews with "on-site investigations." As will be shown, it is this change that would ensnare most of the additional carriers the Agency currently expects to label as "unfit" under the proposed rule.

The parties filing these Comments (Commenters or Coalition) include motor carriers, transportation brokers and trade associations which have consistently challenged SMS methodology ever since the Agency unveiled it in 2010 as part of a program now known as "Compliance, Safety, Accountability" (CSA). Now the Agency has abandoned any pretense that SMS merely provided guidance or interpretative rules, and has admitted in this docket that its proposed Safety Fitness Determination (SFD) rule based on SMS methodology must be scrutinized under legal criteria for substantive rulemaking dockets.

These Comments accordingly will resubmit, as Supplemental Documents, all the statistical studies that the commenting parties previously offered to the Agency in response to its initial and many amended notices about SMS methodology that did not comply with statutory rulemaking requirements. Those studies were not considered by the Agency in its previous "rulemaking lite" proceedings, and have not been addressed in the NPRM here.

In addition, these Comments will include new Affidavits demonstrating that under FMCSA's own analysis in drafting the NPRM, *a majority* of the carriers caught in the Agency's proposed "unfit" criteria based solely on inspections were *entirely crash-free* for at least a year after their

hypothetical "unfit" designations – and that many more probably have no *preventable* crashes, which the Agency belatedly admits are the only accidents it should consider for safety fitness purposes.

Other Affidavits and Exhibits will address the ongoing defects of the SMS methodology that the Agency in effect seeks to ratify in the proposed rule, and demonstrate the real-world harm visited upon carriers and brokers by that same methodology.

Specifically, these Comments will address the following points in turn:

(1) FMCSA should affirm that it is solely its job to determine which carriers are safe to operate on the highways, and therefore safe for shippers and brokers to use. Consequently, SMS methodology should be used only as an internal tool to prioritize carriers for enforcement.

(2) The NPRM in this docket is premature under the Fixing America's Surface Transportation Act enacted December 4, 2015 (FAST Act, Pub. L. 114-94). The Agency's issuance of the NPRM barely six weeks later flouted specific requirements of that Act.

(3) The roadside inspection data that the NPRM would use for SFDs is riddled with the same pervasive data quality defects that have always afflicted the SMS methodology on which the proposed rule is inextricably based. Those defects include disparate harmful impacts on smaller carriers, inconsistent enforcement practices by States, inadequate DataQ processes for challenging alleged violations, and the widespread undercounting of "clean" inspections.

(4) The superficial changes to SMS proposed for the new SFD process will not rehabilitate this methodology into a reliable, inspection-based predictor of the safety of individual motor carriers. This methodology still uses Behavior Analysis and Safety Improvement Categories (BASICs), safety event groups (SEGs, or peer groups) and severity weightings that have been the focus of industry, governmental and academic criticism ever since the unveiling of SMS in 2010.

(5) The proposed SFD rule is an affront to administrative due process in at least five ways:

(a) For SFDs based in whole or in part on roadside inspection data, the Agency seeks to justify its "proposed unfit" thresholds by pointing to crash data reflecting average crash rates within various BASICs, even though a majority of the individual carriers that would be shut down under these thresholds had *no recordable crashes* (let alone preventable ones) during the year after they would have been declared unfit;

(b) For SFDs derived in whole or in part from on-site investigations of carriers, the rule would compress appeal periods available to carriers, would reduce their opportunities to devise and implement corrective action plans before being shut down, and thus would expose them to Agency-dictated "compliance agreements" on a take-it-or-leave-it basis;

(c) For key aspects of the SFD process – including the actual percentiles and raw scores to be used as "unfit" thresholds for roadside inspection results, the severity weightings to be used for violations discovered at roadside, and even the means by which "acute" and "critical" violations will be scored in on-site investigations – the NPRM provides wholly inadequate "notice" of the Agency's actual intentions;

(d) FMCSA fails to explain why so much due process is being sacrificed for such paltry results, given that the Agency anticipates placing fewer than 400 additional carriers out of service based even partly on unaudited roadside data. On-site audits of these 400 carriers would hardly strain the Agency's and state partners' resources, which are still conducting more than 11,000 audits on general freight carriers annually. Therefore it is hard to resist the suspicion that the currently proposed "unfit" thresholds are merely a "foot in the door" in anticipation of proposing much lower thresholds if this docket establishes a precedent for inspection-based SFDs; and

(e) FMCSA inadequately measures the benefits of the proposed rule and fails to adequately assess the cost to shippers, brokers and carriers as required by the FAST Act.

(6) The due process defects pervading the proposed rule reflect an inadequately explained shift in the Agency's enforcement philosophy. Specifically, SMS methodology and progressive intervention were promoted by the Agency to shippers, brokers and carriers as ways to improve carrier safety through education before a compliance review that could affect carriers' ability to operate and serve the public. But it is manifested in this NPRM that there is no room for education and improvement. In fact, any investigation by the Agency, including a focused off-site audit, could result in an unfit finding at any time without warning or meaningful opportunity to improve, regardless of that carrier's crash rate. If a carrier is deemed to exceed SFD percentiles or raw scores it can be profiled as a "bad actor" and be put summarily out of business without any consideration of its safety management programs or its corrective action plan. The carrier's only alternative is to submit to a compliance agreement, which FMCSA may dictate without judicial restraint or regulatory guidelines as part of the SFD process. Commenters object to this rule as criminalizing the SFD process by simply counting violations regardless of causation, pronouncing carriers as guilty and sanctioning them with economic death – whether by being placed out of service or by being forced to sign a compliance agreement publicly branding them as convicted, unsafe carriers out on probation.

(7) The Agency's 42-page Regulatory Evaluation (RE) of the proposed SFD rule is wholly inadequate because:

(a) As noted above, it contains no consideration or analysis of the critiques of SMS methodology that the Commenters and others have submitted in response to the Agency's prior "rulemaking lite" notices presenting SMS as a fait accompli.

(b) The Agency has analyzed only 2011 data in projecting the "unfit" carriers it expects to shut down under the proposed rule, and has assumed that 2011 is representative of current and future data. This cannot be assumed because of the declining number of inspections in connection with traffic stops, coupled with the likely reduction of logging and speeding violations with the advent of mandatory electronic logging and speed limiters in the

next few years. These trends could compress inspection data to a point where many fewer violations would be needed to exceed the percentiles defining the "failure" thresholds for particular BASICs.

(c) The Agency's cost-benefit analysis is wholly inadequate. It professes ignorance of the costs for carriers to comply with the proposed rule, of job losses to non-driver employees of carriers and the cost of loan defaults and repossession of equipment of the carriers it shuts down. These types of issues could have been explored more appropriately in an Advance Notice of Proposed Rulemaking (ANPRM) such as was contemplated under the FAST Act.

(d) There is no meaningful examination of how the proposed SFD rule would affect carriers of different sizes and in different industry segments, as mandated by the FAST Act. When the Agency observes that most motor carriers are small entities within the meaning of a threshold used by the Small Business Administration, it makes a mockery of the more granular analysis required by the FAST Act.

(e) Nor is there meaningful evaluation of the proposed rule under such foundational statutes in federal administrative law as the Administrative Procedure Act (APA), the Regulatory Flexibility Act (RFA) and the Data Quality Act (DQA), which are fully cited and discussed in Part IV.B below.

(8) Finally, the Agency utterly fails to consider alternatives to the proposed rule as required by the RFA. Commenters respectfully submit that after six years of controversy and experimentation with the patently and chronically flawed SMS methodology, it is time for the Agency to start over with a different approach. As will be explained, an alternative approach would combine elements of the biennial updates already required under the new Unified Registration System (URS) with aspects of the new entrant safety assurance process that already exists. The Coalition believes that biennial desk audits of every motor carrier with a USDOT number would be feasible if current Agency resources were supplemented by a modest fee for the biennial updates. Unsatisfactory responses to the desk audits

could be followed up with the on-site reviews and other interventions that are already in the Agency's toolkit. This alternative would be a vast improvement over the proposal here, which the Agency admits would reach only a small portion of the carrier population.

II. Concerns of Commenting Parties

Commenters share the Agency's commitment to highway safety and submit that it is solely the agency's job to certify carriers as safe to operate and hence safe to use. The Coalition represents many small motor carriers that can be shown to fare poorly in a data-driven SMS because of data insufficiency, flawed data and other systemic defects that are inextricable from the proposal at hand. In this submission, Commenters will show that a substitution of raw data and "investigations" for the current compliance review process abandons the Agency's primary objective, which should be to determine whether carriers' management has in place sufficient safety compliance measures to assure safe operation. Instead, the Agency's proposed approach is to ascertain whether a carrier, regardless of causation by even a rogue driver who was terminated, has exceeded some artificial limbo bar for enforcement based upon statistical assumptions.

This NPRM represents the culmination of long anticipated proposals for changing the Agency's SFD rules in 49 CFR Part 385. Traditionally, the Agency's SFDs have been based on a compliance review that is initiated by the state safety director as determined necessary based upon various sources of information including whistleblowers, serious accidents, and other indicia. (See ***Affidavit of Richard Gobbell***.) The purpose of the compliance review has not been to decimate the industry or put carriers out of business based upon percentile rankings or the vagaries of roadside inspections. Instead, it has been to assess the safety management system of the carrier to ensure that safety procedures were in place and that *management* was not, through negligence or malfeasance, "requiring or permitting its drivers to violate safety regulations."

The rules were designed to (1) identify patterns of violations, (2) provisionally assign conditional or unsatisfactory ratings, and (3) allow carriers to admit violations and file a Section 385.17 petition showing corrective action. With the Agency's approval, a corrective action plan would

allow the carrier to continue to operate subject to subsequent re-audit by the agency to affirm that any safety defects had been corrected. This safety improvement and appeals process, the Commenters submit, has worked effectively and does not need to be changed. (See page 2 of ***Gobbell Affidavit*.**)

The Agency's stated intent in presenting this NPRM at this time is to "more effectively use FMCSA data and resources to identify unfit motor carriers and remove them from the nation's roadways." As will be shown in Part III below, the Agency has been attempting to establish use of roadside data, peer groups and percentile rankings in BASICs as a viable measurement of carrier safety fitness since at least 2004, when the Department of Transportation Inspector General (IG) questioned the SafeStat methodology that was a predecessor to SMS.

Commenters have shown – and government oversight organizations such as the IG, the Government Accountability Office (GAO) and the Independent Review Team (IRT) largely agree – that SMS methodology is flawed, generates insufficient data to accurately measure small carriers and is inaccurate in predicting the actual safety performance of individual carriers.[1] FMCSA's unwavering commitment to SMS methodology and its issuance of this NPRM notwithstanding the recent strictures imposed on use of SMS methodology by Congress betrays a changed attitude by the Agency towards enforcement that is manifested in the SFD proposal.

Roadside data alone and percentile rankings of carriers based upon infractions obviously do not necessarily reflect systemic flaws in carrier operations. Nor do they support or allow the conclusion that from the top down a company is so callous about safety that it should be assigned an unfit safety rating on short notice resulting in the carrier's demise. It is significant that this SFD is based on a highly convoluted version of the old SafeStat system, which utilizes percentile rankings and peer groupings to rank carriers based on compliance records without any analysis of causation, management culpability, or effectiveness of proposed corrective action plans.

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[1] See "Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers," GAO-14-114, February 2014; "Actions are Needed to Strengthen FMCSA's Compliance, Safety, Accountability Program," MH-2014-032, March 5, 2014; and "Report of the Independent Review Team," July 15, 2014, respectively.

Commenters will show in each of the BASICs that small carriers are particularly prejudiced in the use of the SMS methodology based on:

(a) Where they operate (enforcement anomalies in Unsafe Driving and Vehicle Maintenance);

(b) Whether they use ELDs or rely upon a paper log (Hours of Service (HOS));

(c) The age and nature of their equipment (Vehicle Maintenance); and

(d) The paucity of inspection information (Drug and Alcohol, HM and Driver Fitness).

Commenters submit that this NPRM doubles down on use of roadside inspections and SMS methodology despite these known systemic flaws.

The Agency now acknowledges that the absence of sufficient roadside data precludes assigning a safety fitness determination to most of the 90% of carriers it regulates that operate fewer than 10 power units, according to FMCSA's Motor Carrier Management Information System (MCMIS). In the SFD NPRM, the marginal utility of roadside inspections and SMS methodology is reduced to assessing 75,000 carriers – of which only about 30,000 have enough violations to even potentially fail a BASIC based on data alone – for possible intervention under a new and more "efficient" procedure that is fundamentally different than the compliance review that has worked effectively for 50 years. See NPRM, 81 Fed. Reg. at 3574 and ***Affidavit of Avery Vise***, attached.

The investigation the Agency envisions is not aimed at determining the attitude of management towards safety compliance or determining whether poor over-the-road performance is the result of driver error that management neither permitted nor condoned. For example, a single driver whose qualification file is properly maintained by carrier management can nevertheless accumulate as many as 30 points on one inspection, causing a small carrier's SMS percentile rankings to spike through no fault of management, which might immediately terminate the driver anyway.

Similarly, carrier management with a random drug sampling program in place can inadvertently fail to timely collect one random sample – an acute violation – and without the possibility for a petition to upgrade, which the agency proposes to abandon, a carrier apparently will have no way

of evidencing corrective action. Moreover, the Agency seeks comments to add to the list of acute violations other distinctly driver-centric infractions such as texting, use of cell phones or seat belt violations that are neither permitted nor condoned by management.

Commenters submit that the Agency's proposed use of SMS methodology and "investigations" without any fair assessment of carrier management practices and procedures falls grossly short of treating carriers equitably. The procedures the Agency would put in place offer the carrier no meaningful opportunity to plead its case or show corrective action. Causation for infractions (whether driver error, inadvertence or culpability) is not considered. Except for calling balls and strikes on accident preventability, the investigator's job is made simple – find the right combinations of acute and critical violations and issue a 15-day notice to cease operations. The carrier's only option is to either sign a compliance agreement – the terms of which are dictated by the Agency, as will be shown in Part IV.G below – or cease operations, lay off drivers and file for bankruptcy when it cannot make payments on equipment and terminals. Any good will or ongoing value of customers is immediately lost. (See ***Gobbell Affidavit***.)

The alternative offered by the NPRM – that the carrier cease operations and at some time in the future try to start all over again under the proposed new language of 395.18 – ignores the economic realities of the trucking business. An unfit finding, and loss of any realistic opportunity for an upgrade due to accelerated appeal periods, effectively provides the carrier with no judicial recourse. It also eliminates any fair consideration of the company's ability to take appropriate corrective action that ameliorates the auditor's filings and offers reasonable assurance of future compliance.

Attachments to these Comments include:

- Appendix, which consists of the Commenters direct responses to specific questions the Agency posed for comment in the NPRM;
- Exhibits, which are documents such as reports, legislation, articles, etc., that are cited in the Comments;
- Affidavits, which are declarations of key subject-matter experts; and

- Supplemental Documents, which are comprised of selected regulatory and judicial documents previously submitted by members of the Coalition related to the issues discussed herein.

III. Procedural History of SMS and its SFD Offshoot

With the passage of SAFETEA-LU (Pub. L. 109-59) in 2005, Congress told the Agency to develop a better safety fitness plan that would allow it to provide an actual safety fitness determination for all 525,000 carriers it regulates. In 2004, the Department of Transportation IG had examined SafeStat, the precursor to SMS methodology, and stated:

> "However, while the data used for SafeStat calculations are sufficient for internal purposes, if public dissemination of SafeStat results is to continue, the data must meet higher standards for completeness, accuracy and timeliness." (Memorandum, p. 3.)
>
> "Because carrier safety data and the model's ranking are publicly disclosed, a higher standard of quality must be met to ensure fairness to motor carriers who may lose business or be placed at competitive disadvantage by inaccurate SafeStat results. FMCSA will need to demonstrate timely improvements if it is to continue to publicly disclose carrier results across all SafeStat categories." (Executive Summary, p. iv)

Beginning in fall 2010, members of the Commenters' coalition pointed out to the Agency that publication of SMS methodology was misleading and should not be touted as an alternative credentialing criterion for shippers and brokers to use. As a result of *NASTC et al. v. FMCSA, No. 10-1402, 2011 U.S. App. LEXIS 7403 (D.C. Cir. March 10, 2011)*, the Agency signed a settlement agreement in which it acknowledged:

> "Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways." ***(Supplemental Documents, part A.9)***

The Agency also agreed to make clear that any indication of carrier compliance resulting from SMS publication was "for the Agency's use in prioritizing carriers for intervention" only. Nonetheless, the Agency has spent 5½ years attempting to perfect SMS methodology and establish its fitness for use, but to no avail. Various aspects of three government studies

conducted by the GAO, the IG and the IRT that provided guidance to FMCSA have found systemic unaddressed problems with SMS methodology. In 2015, Congress under the FAST Act required the removal of SMS alerts and relative percentiles from public view pending a two-year study and validation process.

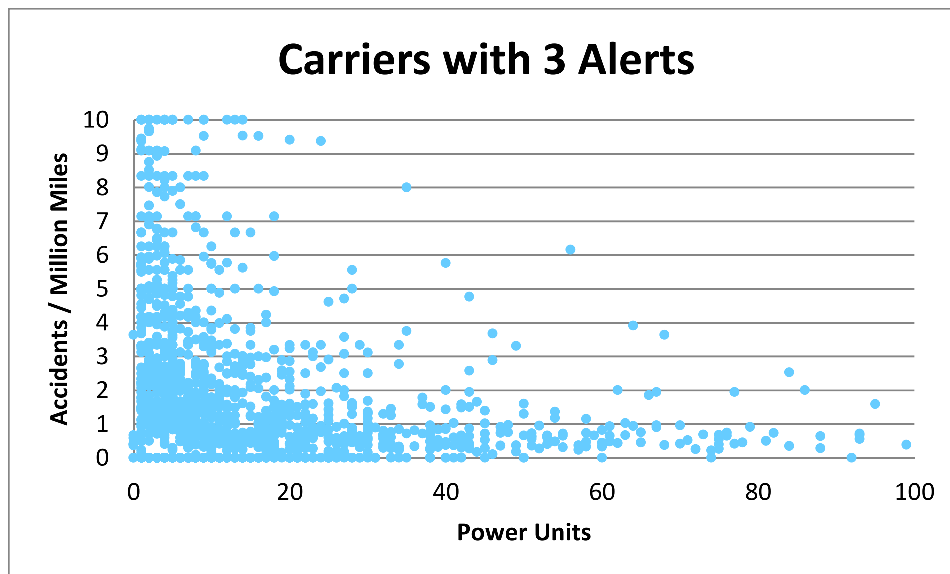
Ever since 2010, members of the Coalition filing these Comments have individually and collectively questioned the use of roadside inspections in the SMS measurement system in determining carrier safety. Not only have they challenged the fairness, sufficiency and adequacy of roadside inspection data and its lack of provable correlation to individual safety performance; in addition they have submitted documentary proof to show that the use of percentile rankings, and peer groupings, aggregate crash rate assumptions and unscrubbed crash data was so irredeemably flawed as to defeat any premise of data accuracy. See "Statistical Issues in the Safety Measurement and Inspection of Motor Carriers" by James Gimpel, University of Maryland (hereinafter "Gimpel Study") and "CSA: Another Look With Similar Conclusions" by Wells Fargo Securities, July 2, 2012 (hereinafter "Wells Fargo Study"), attached as ***Exhibit A*** and ***Exhibit B***, respectively.

Through the Gimpel Study, Commenters first introduced the idea of the "law of small numbers," showing that roadside inspections alone could never gather sufficient data to measure motor carriers that operate fewer than 10 units, which constitute 90% of the motor carriers the Agency regulates according to FMCSA's MCMIS. With the Wells Fargo Study, clear evidence was adduced that great fluctuations in carrier performance will occur and are not limited to carriers with fewer than 5 or 6 inspections or even 11 inspections. The wild fluctuation in crash data does not level out until scores involving very large fleets are considered.

In a response to the American Transportation Research Institute (ATRI) study, upon which the Agency now relies, the Coalition prepared its own analysis of contemporaneous data, which demonstrated that a correlation to safety could not be demonstrated simply by assuming that a carrier with certain SMS scores barriers was per se unsafe. The following graph (**Figure 1**), which was submitted as part of current Commenters' response to the ATRI study, demonstrates

that any trend line masks the fact that great numbers of small carriers who were branded as a result of this methodology have had no crashes.

Figure 1 – Crash rates of carriers with 3 golden triangle alerts under SMS



Moreover, the Commenters have submitted that while average percentile scores fluctuate wildly based upon the number of inspections – a factor militating in favor of grouping – the establishment of SEGs in and of themselves creates an arbitrary distinction that leads to "peer group creep." This is the phenomenon in which a carrier in the middle of the pack statistically in one peer group, by the addition of a single inspection, can find its percentile ranking jump 20 or 30 points. All of a sudden, a carrier can be labeled a "bad actor" or under "alert" because that additional inspection pushes the carrier into another peer group.

Finally, the Coalition has have consistently challenged the support offered for use of roadside inspections based upon average carrier performance. See comments and exhibits filed in Docket No. FMCSA-2012-0074, on July 5, 2012, accompanying the present Comments as ***Supplemental Documents, Parts F1-2***. Those comments included the graphs below, which show the fatal flaw in an analysis by the FMCSA-affiliated Volpe Center. The Center's analysis assumed that all carriers with a similar performance record under a given BASIC in a given peer group can be presumed to share common safety attributes. The graphs show that a "regression of averages" for a given BASIC may suggest neat trend lines (**Figures 2 and 4**), while the data for individual carriers dissolve into ink blots (**Figures 3 and 5**).

Figure 2 – FMCSA Regression of Averages – Fatigued Driving

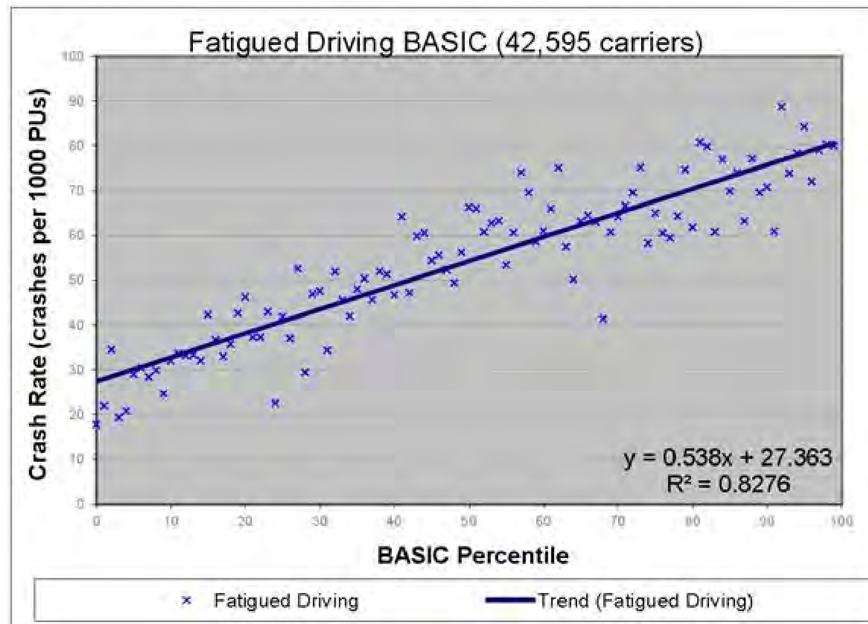


Figure 3 – Fatigued Driving – Plot of 35,933 Carriers

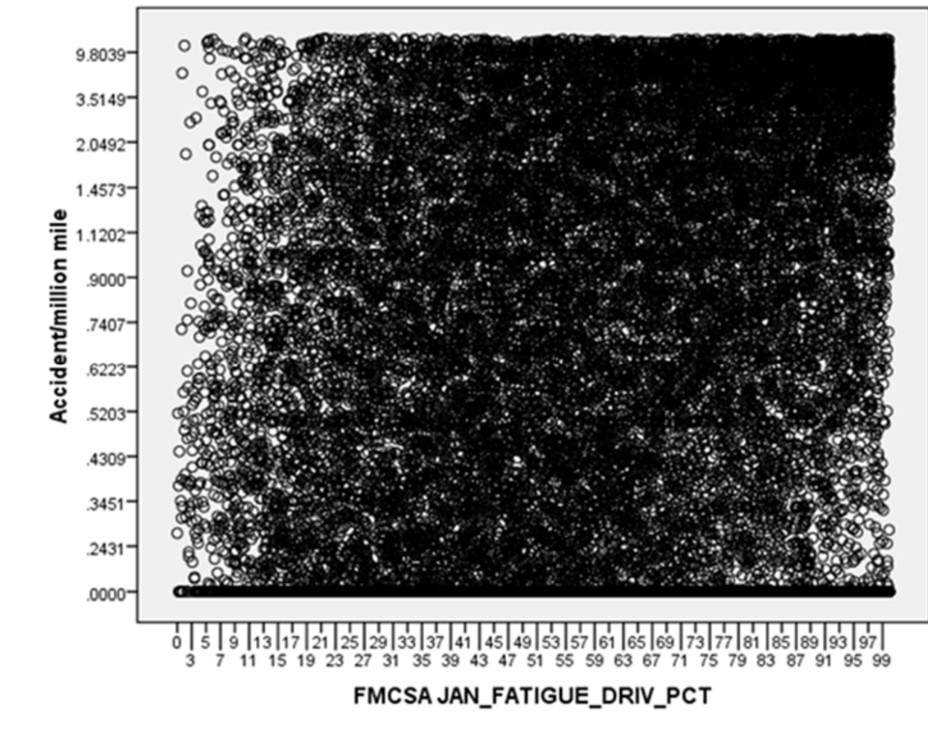


Figure 4 – FMCSA Regression of Averages – Unsafe Driving

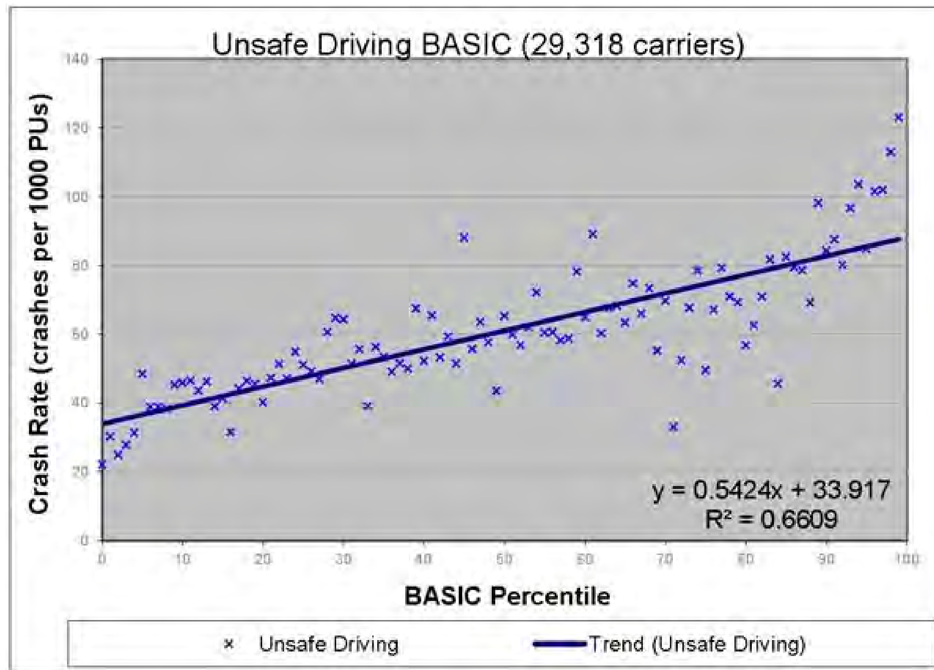
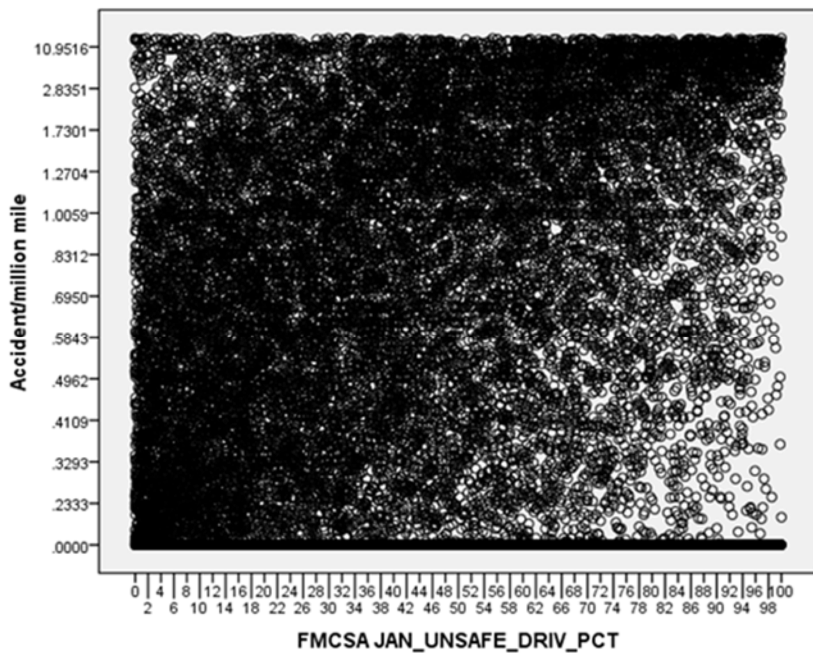


Figure 5 – Unsafe Driving – Plot of 26,435 Carriers



The Agency has yet to address the core issue illustrated by **Figures 1 through 5** above, which is that roadside inspections produce so many false positives as to be unreliable and misleading as a predictor of individual carrier performance.

With this background, the Coalition applauds the Agency's belated recognition in the NPRM that the law of small numbers does exist (81 Fed. Reg. at 3577) and its candid admission that even in the exercise of its expertise it can identify fewer than 300 of the 525,000 carriers it regulates as unfit based on roadside data alone (id. at 3564). Even so, the Agency still seeks to validate through rulemaking its use of roadside inspections and data alone in finding a carrier unfit. The Agency must be reminded that it cannot ignore the fundamentally flawed data and statistical conclusions that underlie the rule it proposes.

Members of the Coalition have been involved in two D.C. Circuit cases and numerous quasi-rulemaking dockets staged by the Agency (see ***Supplemental Documents A through J*** attached to these Comments), and consistently have challenged Agency guidance that SMS methodology was fit and intended for use by shippers and brokers. Notwithstanding the Commenters' repeated submissions in the Agency's prior "rulemaking lite" exercises, the Agency has ignored the systemic flaws in using roadside inspections to make a safety fitness determination. Commenters submit that each of the issues raised in those prior proceedings, while not new to the Agency, remain material issues of fact and law that have not been addressed in accordance with the requirements of the FAST Act, APA and other statutes that are intrinsically involved here.

IV. Argument

A. The Agency must ratify its sole duty to determine carriers' fitness to operate and to publish for use by the shipping and broker public a list of carriers that are, accordingly, safe to operate and safe to use

As set forth in prior submissions to the Agency and in two judicial challenges, the Agency's attempt to publish SMS methodology – and to suggest that shippers and brokers as "stakeholders" must second-guess the Agency's ultimate safety fitness finding – is highly improper. It has spawned costly and vexatious litigation against shippers and brokers on "negligent selection" and similar theories.

The Agency has acknowledged that pursuant to 49 U.S.C. §31144 the Agency – and only the Agency – is responsible for making an ultimate safety fitness determination and publishing it for use by the public. In fact, in *NASTC et al. v. FMCSA, supra*, it agreed to the following language as discussed earlier:

> "Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."

The evidence is overwhelming that publication of SMS methodology and safety data without the Agency's affirmation that the shipping community can rely upon FMCSA's ultimate safety fitness determination has serious repercussions on shippers and brokers. The shipping public is not able, equipped or required to second-guess the Agency's ultimate safety determination. (See affidavits submitted in NASTC v. FMCSA and ASECTT v. FMCSA, included in ***Supplemental Documents, Parts A and B.***)

Commenters have demonstrated that ever since the regulation of interstate motor carriage began under the Commerce Clause of the U.S. Constitution (with its necessary implications of federal field preemption), FMCSA and the Interstate Commerce Commission before it have been solely responsible for determining which carriers are safe to use. FMCSA's affirmation of its statutory duty is needed to protect shippers and brokers against being dragged into costly and litigious accident litigation, and it would assist in the free flow of interstate commerce, allowing carriers both large and small to be used. See "Federal Preemption in Motor Carrier Selection Cases Against Brokers and Shippers," Robert D. Moseley, Jr., and C. Frederic Marcinak, introduced as ***Exhibit C*** to these Comments, and "A Commentary: The Perfect Storm: Schramm Decision, FMCSA, and Impossible Duty for Brokers and Third Party Logistics Companies," by Paul Stewart, attached here as ***Exhibit D***. Both of these articles were included in the comments submitted by many of the Coalition members here as part of their joint presentation in Docket FMCSA-2012-0074, which as noted earlier is reproduced in full as ***Supplemental Documents, Parts F1-2*** attached to these Comments.

Clearly this issue has not gone away nor been adequately addressed before by the Agency. Attached to these comments are ***Affidavits of David Gee, Garrett Martin, and Tom Sanderson*** that indicate the continuing economic burden, legal costs and vexatious litigation faced by shippers and brokers as a result of the Agency's failure to confirm its duty. Commenters have no alternative but to challenge the Agency's attempt to establish by rulemaking that the publication of roadside data establishes an alternative credentialing obligation on the shipper and broker community.

The Agency, in proposing a single safety fitness determination of "unfit" in this docket, does appear to be acknowledging that all other carriers that are licensed, authorized and insured are not only "fit to operate" but "fit and safe to use by shippers and brokers." So far, so good. But FMCSA has failed in this NPRM to consider the economic consequences of publishing roadside data, percentile rankings or pejorative terms such as "proposed unfit/operating under compliance agreement,"[2] without first affirming that shippers and brokers are beneficiaries of the Agency's ultimate safety fitness determination. Congressional oversight committees have asked FMCSA officials, both in confirmation hearings and in writing, to affirm the Agency's sole duty as the arbiter of highway safety and that "fit to operate is fit to use." See Post-Hearing Questions for T.F. Scott Darling III, attached as ***Exhibit E***.

To date, FMCSA has not conducted a study of the effect on the trucking industry of negligent selection lawsuits using published SMS data, nor has it affirmed the preemptive effect of its decision that a carrier is safe to operate and hence safe to use. Thus, Commenters submit that any new SFD regulation is premature until the Agency first affirms that its ultimate SFD is the sole legal standard for the shipping community to use in determining carrier safety fitness.

For the past six years, the Agency has touted SMS methodology as a fair representation of carrier safety to the shipping public. (See part III above.) Those assumptions have been challenged by Commenters, by the GAO, the IG and the IRT, and by Congress in directing the Agency to

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[2] Similarly, and with equal impropriety under the FAST Act, the Agency has separately proposed in docket No. FMCSA-2015-0439 to publish lists of "high risk" carriers based directly on SMS data. See comments in that docket by many of the undersigned parties here, reproduced in ***Supplemental Documents, Part J*** attached hereto.

conduct a study and a corrective action plan before returning SMS scoring to public view. Commenters submit that based upon the data the Agency has submitted here, SMS methodology is not fit for use in making a safety fitness determination at any level. Commenters also submit that at best roadside data should be used to determine which carriers are subject to a compliance review so that in a comprehensive audit the Agency can evaluate management's willingness and ability to comply with the existing safety regulations.

Now even the Agency's own analysis shows roadside inspections are an inaccurate predictor of safety. See discussion in ***Vise Affidavit*** of data obtained May 4, 2016, through a request under the Freedom of Information Act (FOIA). Accordingly, now is the time for FMCSA to affirm that it is solely its job to determine which carriers are safe to operate and safe to use and that SMS methodology and any derivative thereof can be used by the Agency only as an internal tool for prioritizing carriers for enforcement.

B. This NPRM is premature under the FAST Act, flouts Congressional intent, and wastes public and private resources on a proposed rule that may not survive the SMS reform process mandated by Congress.

The Agency strains mightily to argue that simply by using so-called absolute failure standards that are calculated using SMS relative percentiles on a date certain, its proposed SFD process somehow launders all the myriad ills of the SMS methodology condemned by Congress in the FAST Act provisions.

By the Agency's own admission, the "same data" it gathers and utilizes under SMS will be used "in making Safety Fitness Determinations under this NPRM." See NPRM, 81 Fed. Reg. at 3563. For carriers being rated by inspection data alone, all the familiar features of the SMS scoring process will remain in use. These features include the organization of inspection data into BASICs, the aggregation of particular carriers into peer groups based on their operational characteristics and number of inspections, and the assignment of severity and time weightings to particular violations. Id. at 3562, 3574-75.

While admitting these similarities, the Agency emphasizes that "a carrier's absolute BASIC performance measure in any given month, not the carrier's percentile within a given month,

would be used to determine if the carrier failed the BASIC." Id. at 3562. With due respect, these Commenters submit that the claimed use of "absolute" measures rather than percentiles is a distinction without a difference. In fact, the so-called "absolute" failure standards will be determined in a one-time calculation of failure standards *based on particular percentiles for weighted and peer-grouped SMS data in particular BASICs.* Id. at 3574-76. Moreover, these so-called "absolute measures" are hardly absolute in view of the elaborate suite of time weightings, severity weightings and peer-grouping processes used to massage the raw data from inspections.

Consequently, the SFD rule proposed here falls squarely within subparagraph 5221(d)(2)(C) of the FAST Act. (This provision, along with others demonstrating the prematurity if not outright unlawfulness of this NPRM, is reproduced in ***Exhibit F*** to these Comments.) Subparagraph 5221((d)(2)(C) requires any rulemaking "that relates to the CSA program, including the SMS or data analysis under the SMS" to consider the "corrective action plan" resulting from a thorough CSA/SMS review and reform process laid out in great detail by the remainder of Section 5221. Congress has allowed as much as 26 months for the completion of the three phases of this process that are prescribed in subsections (c) through (e) of Section 5221.

The plain language of this statute leaves no room for dispute that the SFD process proposed in this docket "relates to" CSA and to data analysis under the SMS, and that the corrective action plan which must be "considered" in this rulemaking does not exist at this time and likely will not exist until sometime in 2018. When Congress prescribed this elaborate review and reform process, surely it did not intend that FMCSA should go forward with an SMS-based rulemaking at this time – and then consider the FAST Act corrective action plan only as an afterthought at the end of the process. It is an enormous waste of public and private resources for the Agency to charge ahead at this time with a notice-and-comment process premised on SMS methodology that may not survive FAST Act scrutiny.

The FAST Act provision on which the Agency relies in proceeding immediately with this docket is far from conclusive. Section 5223(b) states that "information regarding alerts and the relative percentile for each BASIC developed under the CSA program may not be used for safety fitness determinations" until completion of the review/reform process described in Section 5221. The

Coalition submits that "information regarding" relative percentiles would include absolute failure standards set using relative percentiles at a given point in time. Moreover, it is clear that relative percentiles will come back into the SFD process when a carrier is publicly labelled as "proposed unfit" upon signing a compliance agreement pursuant to the proposed revisions of Part 385. NPRM, 81 Fed. Reg. at 3585. The Agency also has made it clear that a standard condition of compliance agreements would require "performance *below* … current SMS intervention thresholds." Id. at 3585 (emphasis in original). Those current thresholds, of course, are percentile-based rather than being "absolute" in any way, shape or form.

In similar fashion, Section 5202 of the FAST Act amends 49 U.S.C. § 31136(f) to require the Agency's consideration of the effects of a proposed major rule on "different segments of the motor carrier industry" whenever such consideration is "practicable." The Agency's only industry segment analysis appears in its discussion of "small entities," and begins and ends with the observation that the "overwhelming majority" of the motor carriers of freight and passengers it regulates would be considered small entities under a definition used by the Small Business Administration (SBA). NPRM, 81 Fed. Reg. at 3596. This observation is fails to satisfy either the FAST Act requirement for business segment analysis or the RFA requirements for consideration of "small entities"; see parts IV.B and IV.G below.

FMCSA concluded that the SBA's $27.5 million ceiling for small carrier status is equivalent to 148 power units for freight and 93 power units for passengers. (See RE, Initial Regulatory Flexibility Analysis, at 37.) Although the Commenters question whether simply adjusting 16-year-old revenue per power unit data for inflation produces an accurate estimate, ultimately the exact number is beside the point. Given that FMCSA admittedly has much more granular information about the number of carriers having fleets of particular sizes (see, e.g., Table 7, 81 Fed. Reg. at 3573), clearly it was "practicable" for the Agency to conduct a more detailed and stratified analysis of the effects of the proposed rule on various categories of small entities. Its failure to do so is, once again, indefensible under the FAST Act. The various deficiencies of the NPRM under the criteria of Section 5202 will be developed further in these commenters' subsequent discussion of data quality issues and methodological flaws in the proposed rule.

C. Roadside inspections and SMS methodology are fatally flawed and cannot be used to evaluate individual carrier performance

If roadside data, SMS algorithms and peer grouping are shown to be insufficient, inaccurate and otherwise fatally flawed, then the proposed raw scores to be set as "failure" thresholds in this system cannot pass data accuracy standards as a reliable predictor of a carrier's safety fitness.

There are seven reasons the proposed system is systemically flawed:

1. Insufficient data. Under the proposed standards of 11 inspections with violations and failure standards equating to the 96th or 99th percentile in two BASICs, the roadside inspection data that the Agency says totals over 3.7 million inspections would only result in 13 carriers being declared unfit to operate based on using March 2016 SMS measures (see attached ***Vise Affidavit***). All but two of those carriers would have already been declared unfit based on February 2016 SMS measures (id.), so it would appear that significantly fewer carriers would be found unfit based on roadside data alone than the 262 that FMCSA estimates. Commenters submit that the reason why fewer carriers are identified as unfit through inspection data is the considerable decrease in the number of traffic enforcement inspections over the past decade. This trend, discussed in Part 1V.H.2 below, inherently reduces the volume of data feeding the Unsafe Driving BASIC.

The Agency states it can assess 75,828 carriers based on 11 inspections. NPRM, 81 Fed. Reg. 3574. But only about 30,000 carriers have 11 inspections with violations in at least one BASIC – its minimum threshold for potentially failing a BASIC based on data alone. (See ***Vise Affidavit***.) Even if the data and statistics generated by SMS met data quality standards – which they do not (see Part IV.F below) – this result would be woefully inadequate as a measuring rod for the remaining 450,000 carriers the agency regulates.

2. The law of small numbers. At page 3577 of the NPRM the Agency recognizes the effect of the law of small numbers, implicitly acknowledging for the first time that its publication for five years of percentile rankings of carriers based on 3 or 4 inspections is statistically insufficient for the Agency to use in making a safety fitness determination. Commenters submit

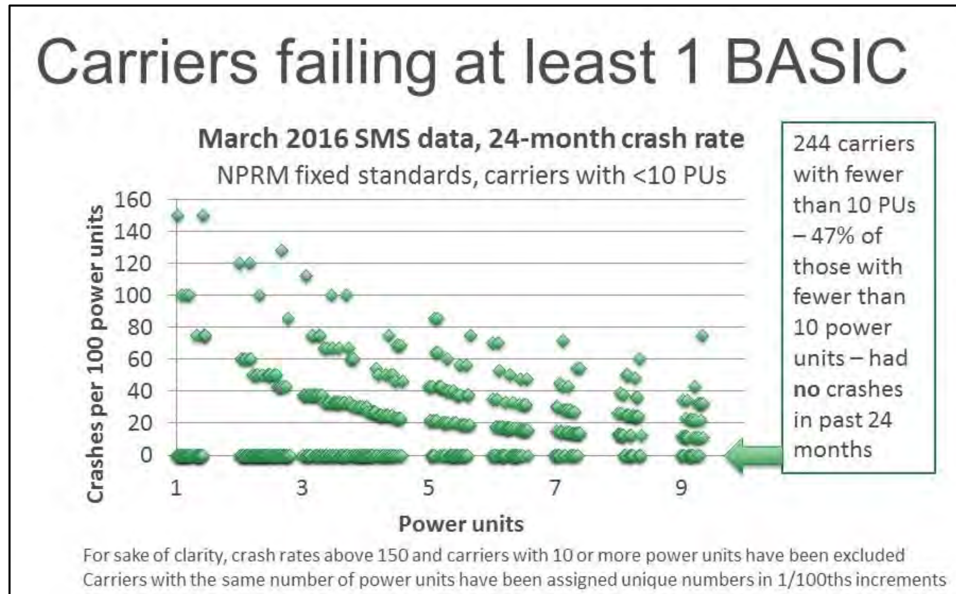
that by acknowledging the effect of the law of small numbers, FMCSA essentially is admitting that the SMS methodology it has released for five years as fit for use by shippers and brokers is systemically flawed with respect to approximately 450,000 unassessed carriers whose ability to compete in the free market for customers' freight has been damaged.

The agency has been well apprised of the effect of the law of small numbers on SMS methodology through the Gimpel Study (***Exhibit A**, supra*), the Wells Fargo Study (***Exhibit** B, supra*) and the GAO Study (cited in n.1, supra). The GAO study commissioned by Congress suggests that a minimum of 20 data points, not 11, is statistically necessary to accurately measure a subject.[3] In this regard, Commenters submit that the Agency's selection of 11 inspections with violations is not supported by any statistical analysis and appears to be arbitrary on its face. In fact, it appears to the Commenters that in an act of expediency, FMCSA has simply chosen to lop off the bottom safety event group in all of the BASICs used in the inspection-based SFDs except for Unsafe Driving, which follows a different safety event group pattern than the other. The Agency fails to consider how the occasional new wrinkles in the proposed SFD methodology – realigned peer groups, higher inspection thresholds, etc. – somehow ameliorate the systemic flaws of SMS in measuring individual carriers.

The following graph (**Figure 6**) demonstrates that because of profiling, the threshold of "11-plus roadside inspections with violations" does not limit scrutiny to medium sized and large carriers. In fact, 41% of all carriers that would have failed a BASIC in March 2016 using the fixed failure thresholds in the NPRM had fewer than 5 power units. (See ***Vise Affidavit***.) Because of the law of small numbers, one bad 30-point inspection spread over 11 inspections with violations can raise a carrier's score by 2.75, thus condemning a carrier entering the first peer group from being able to extricate itself from an unfit finding.

[3] See GAO-14-114, February 2014, supra n.1 at page 24.

Figure 6 – 24-month crash rate for smaller carriers failing at least one BASIC



Moreover, as the above graph shows, because the Agency calculates the effectiveness of its proposed roadside inspection system based upon *average* carrier performance and does not consider either *individual* crashes or preventability, carrier safety performance fluctuates wildly among small carriers. Yet 36% of *all* carriers that the Agency would brand as unfit in one or more BASICs had no crashes in the previous two years. This substantial portion of the small carriers that had no reportable crashes is stigmatized in the FMCSA's analysis by being averaged in with the alleged performance of small carriers with large crash ratios – thus leading to a spurious conclusion that all members of a particular peer group are "bad actors."

As noted under "Insufficient data" above, our analysis shows that roadside data alone currently would flag fewer than 50 carriers a year as unfit to operate – significantly fewer than FMCSA projected using 2011 data. Moreover, small carriers that appear to have large crash ratios under the Agency's analysis may well be prejudiced because of the law of small numbers just discussed.

3. Crash data. FMCSA's analysis of the efficacy of using of roadside inspections has long been contaminated by the Agency's inability to determine crash causation or preventability. It is recognized that at least two-thirds of all crashes were not preventable. See

FMCSA data discussed below in part IV.G.1.a. Clearly, this fact presents a real conundrum for the Agency that Commenters well appreciate. Determining preventability on tens of thousands of crashers per year in order to accurately assess the viability of using roadside data in SMS methodology is a difficult, if not impossible, task. Yet, using unscrubbed crash data to establish the efficacy of a safety fitness determination in measuring small carriers is a systemic flaw. For example, if only 1 out of every 3 crashes is preventable, a 5-truck operator with one crash per power unit per year is likely to have at least 3 reportable crashes that it could not have prevented.

It is important to note that crash data, the law of small numbers and FMCSA's continuing misuse of "average" and collective performance to draw conclusions about individual carriers may well be the reason for a misleading conclusion that undercuts the linchpin of the Agency's argument. The Agency claims that based on 2011 statistics, 41 fatal crashes would have been prevented if profiled carriers had been found unfit**,** and that as a group carriers deemed "unfit" had almost twice the crash rate of carriers not profiled. (See Table 19, NPRM, 81 Fed. Reg. at 3593)

The Agency's use of average crash data, however, totally breaks down when these individual carriers' post-2011 crash records are analyzed. Through a FOIA request, these Commenters obtained carrier-specific crash totals for the 382 carriers identified in the NPRM as hypothetically receiving unfit ratings based in whole or in part on inspection data *if* the proposed SFD rule had been in place in 2011.

Commenters' analysis of the Agency's own data shows that 53% of the 211carriers that would have (1) failed two BASICs based on inspections alone and (2) remained active 12 months following their hypothetical SFD had no crashes during that 12-month period. Similarly, 62% of the 113 carriers that would have (1) failed one BASIC based on data alone; (2) been found unfit through a supplemental investigation and (3) remained active 12 months following their hypothetical SFD likewise had no crashes in that subsequent year. See ***Vise Affidavit***.

These statistics demonstrate a fatal flaw in FMCSA's analysis. <u>Under FMCSA's "look forward" approach, had the inspection-based SFD process been in place in the year analyzed 324 carriers</u>

that in reality operated without a reportable accident the following year would have been summarily placed out of business and subject to bankruptcy.

4. Enforcement inconsistencies. Commenters have repeatedly demonstrated to FMCSA that despite the best efforts of the Commercial Vehicle Safety Alliance, accumulated roadside inspection points are often a function of where a carrier operates, not how it operates. See Commenters' submissions in *ASECTT v. FMCSA*, supra, and other comments submitted to the Agency in ***Supplemental Documents, Parts C-J***. Nowhere are these enforcement anomalies more obvious than in the Unsafe Driving BASIC, which the Agency proposes to introduce into the safety fitness determination for the first time.

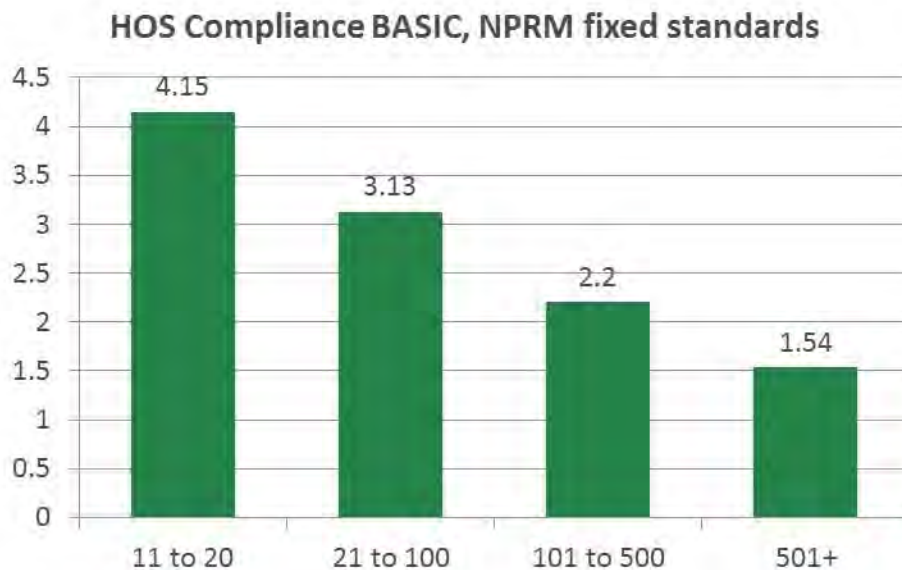
When SMS was initially published, five states – Indiana, Illinois, Michigan, Texas and New Mexico – accounted for 43% of the moving violations in MCMIS. In 2015, five states still accounted for 30% of moving violations. Four of those states are the same, but Iowa, which has just 781 Interstate miles, has replaced Texas, which has 3,233 Interstate miles.

The concentration in moving violations reflects state "probable cause" statutes and other enforcement priorities. Similarly, some states place greater emphasis on seat belt violations while others emphasize vehicle maintenance, etc. As a result, any percentile ranking or raw score derived from a data in this BASIC has an inherent bias against carriers that operate primarily in states which have a significantly higher than average enforcement profiles.

FMCSA acknowledges that enforcement differences exist among states (see page 3564 of the NPRM) but dismisses the impact by claiming that because of high failure standards proposed here, "patterns of noncompliance for the carriers that are proposed unfit are not the result of these disparities but are the result of recurring non-compliance." This argument simply does not hold water when one considers how operating in probable cause states affects especially small carriers subject to proactive enforcement initiatives that are disproportional due to the areas in which they operate.

5. Peer group creep. To its credit, the Agency has recognized different raw numbers are appropriate for peer groups because larger fleets on average have lower raw scores. However, the significant differences in the raw number standards for particular peer groups to receive an unfit in each of the BASICs create problems of their own. For example, below (**Figure 7**) are the failure standards for the HOS Compliance BASIC as listed in the NPRM.

Figure 7 – Safety event group failure standards



FMCSA offers no explanation for the particular inspection cutoffs it employs, although it acknowledges that the variations are precipitous and requests comments about more finely graduated failure standards that would require the carrier to meet a tougher standard practically every time its truck is inspected. (See discussion of the province of Ontario's approach at page 3579 of the NPRM.)

Commenters submit that FMCSA needs to conduct a "root cause analysis" of the dramatic differences in new scores by number of inspections and that, without such an effort, the Agency is trying to treat the symptoms rather than disease. In practice, FMCSA's proposed treatment of the issue, like a similar problem with SafeStat, results in peer group creep that was brought to the Agency's attention in comments that were filed in 2012 but have not been addressed by it. (See ***Supplemental Documents, Parts F1-2.***)

As the above chart shows, a carrier that had 20 inspections in the HOS Compliance BASIC and is safe to operate with a raw score of 4.14 must drop its score by 24% on the next inspection with violations or be declared unfit in that BASIC. Since the raw score numbers and rankings as envisioned by the SFD give no consideration to carrier improvement, the 21st inspection with violations may actually reduce the carrier's raw score, but it nonetheless result in it being determined to be unfit in that BASIC.

Commenters submit that the peer group creep issue, and the great disparities in raw numbers based upon number of inspections, shows that the raw scores FMCSA proposes are actually nothing more than an artificial and arbitrary construct based upon a percentile group analysis conducted in 2011. Thus a carrier's raw numbers based upon inspections are a function not of a carrier's safety management profile – the issue the Agency *should* be considering – but instead, unaddressed data accuracy, data integrity and other countervailing factors.

Importantly, the very existence of safety event groups presupposes that a one-size-fits-all analysis applies to all members of the group. In the attached current affidavit for Coalition-member TEANA (***Affidavit of Irwin Shires***) and the attached ***Affidavit of John Mueller***, this assumption is thoroughly rebutted. The Agency has arbitrarily created for the Unsafe Driving BASIC two different "peer groups" – one for tandem-axle tractors and one for carriers that operate 30% or more straight trucks. This arbitrary distinction based on size of equipment has little to do with the use of the equipment or the characteristics that lead to infractions.

As Shires describes, the Agency has been repeatedly advised how its peer grouping of over-the-road expediters with carriers, both private and for-hire, that typically operate in the commercial zones prejudices expediters, and is an arbitrary and capricious distinction that can greatly affect percentile rankings. FMCSA has not addressed this issue, although TEANA has made every effort to request that it be addressed. See also another, prior affidavit of Irwin Shires dated January 21, 2014, attached here as ***Exhibit G,*** and the letter to William Quade from Shires dated April 15, 2011, attached here as ***Exhibit H***. And as Shires shows, a whole segment of the industry has changed its method of operation to avoid this peer group anomaly.

6. Profiling. Commenters submit that the accumulated points received by a carrier are greatly affected by three factors: (1) inspection profiling; (2) PrePass; and (3) failure to record good inspections.

(a) Inspection profiling. Not discussed in the NPRM is the Agency's use of inspection profiling and the Inspection Selection System (ISS) program, which at the scale houses identifies the priority for inspecting each carrier based on an ISS score. An ISS score prioritizes carriers for roadside inspection based upon past history and frequency of inspections. This prioritization system is inherently biased against small carriers and carriers that have been previously cited for violations. For example, FMCSA's own data shows that power units operated by motor carriers with 1 to 4 trucks are inspected 2.9 times as often as power units operated by carriers with 1,000 or more trucks. *(See **Vise Affidavit**.)*

Figure 8 – CMV inspections by fleet size, 24 months ended March 2016

Inspections by fleet size

24-months ended March 2016
U.S. interstate motor carriers in
March 2016 FMCSA Census

Fleet size	Number of carriers	% of total	Total power units	% of total	Total inspections	% of Total	Inspections per power unit
1 to 4	430,639	78.90%	705,481	15.80%	1,246,931	23.40%	1.77
5 to 9	58,102	10.60%	372,404	8.30%	534,550	10.00%	1.44
10 to 19	29,322	5.40%	390,728	8.70%	545,223	10.20%	1.4
20 to 49	17,680	3.20%	526,116	11.80%	819,311	15.40%	1.56
50 to 99	5,628	1.00%	387,034	8.60%	570,510	10.70%	1.47
100 to 249	2,841	0.50%	429,036	9.60%	472,630	8.90%	1.1
250 to 499	825	0.20%	284,086	6.30%	259,351	4.90%	0.91
500 to 999	424	0.10%	290,253	6.50%	223,877	4.20%	0.77
1000+	290	0.10%	1,091,161	24.40%	664,125	12.40%	0.61
	545,751		**4,476,299**		**5,336,508**		**1.19**

Source of Figure 8: March 2016 inspection and census data at A&I Online

(b) PrePass. PrePass is a system that allows select carriers that subscribe to the program to largely bypass scales, creating in law enforcement's minds different classes of carriers – those in need of inspection or subject to more rigorous examinations and those who are subject to PrePass.

(c) Pre-inspection. The third factor not considered by the Agency, and that Commenters believe helps explain the discrepancies in the raw score analysis, is the use of pre-inspection – i.e., the tendencies of roadside inspectors to not write clean (violation-free) inspections. The proposed SFD system of roadside inspections is based upon assessing raw scores as a ratio of accumulated points versus total inspections. For this system to be valid, all carriers should have the benefit of all inspections conducted, both clean and those resulting in violations. To Commenters' knowledge, FMCSA has conducted no study to determine whether clean roadside inspections are actually entered in MCMIS.

There have been widespread and longstanding reports of vehicles being inspected and cleared without clean inspections being filed. These reports led the magazine *Overdrive,* which has investigated SMS and inspections for more than three years as part of its ongoing CSA's Data Trail series, to join with transportation research firm TransAdvise in recently conducting a survey of commercial motor vehicle operators concerning CMV inspections. Key results of the survey, which generated 574 responses, are as follows:

- Nearly half of respondents (48%) say that clean inspections are reported occasionally or less often;
- Respondents are almost evenly split on whether they ever ask inspectors to file a clean report;
- Nearly half (49%) of those that do ask the inspectors to file clean reports say that inspectors have refused to do so;
- There is no dominant reason inspectors give for refusing to file clean reports. The options offered – "Not enough time;" "Agency doesn't collect that information," and "Inspector has been instructed not to do so" – were fairly evenly split, but nearly half of respondents answering that question reported other or additional reasons given by inspectors, including;

- “Why should I reward you for doing your job?”
- “’Get going unless you want me to find something’ That is a very common reply.”
- “Only reporting safety issues at current site/time.”
- “I can fail a brand new truck, so don’t ask.”

(See ***Vise Affidavit**.)*

Commenters submit that this research strongly suggests that since the Agency’s raw score analysis is based on total number of infractions divided by total number of inspections, and since the number of inspections may be significantly erroneous, FMCSA’s methodology cannot be presumed valid.

7. Enforcement biases. As noted under “Profiling” above, Commenters’ analysis shows that small carriers are inspected on average 3 times as often as large carriers as a result of profiling, yet within each of the BASICs there are systemic flaws that have not been addressed by the Agency and that prevent a fair analysis of particular sets of carriers.

(a) Hours of service. In the Hours of Service Compliance BASIC, infractions that apply only to carriers maintaining paper logs account for approximately 50% of the violations. Large fleets that are more likely to use ELDs do not receive these violations, nor do carriers operating within the 100-air-mile exemption. As a result, Commenters have repeatedly pointed out that the HOS Compliance BASIC frequently measures paperwork violations more than fatigue.

(b) Vehicle maintenance. In the Vehicle Maintenance BASIC, FMCSA has moved away from out-of-service criteria and has included frequent but far less critical violations, which standing alone are insufficient to signify that equipment is not fit to operate. Moreover, profiling of units for vehicle maintenance inspections is particularly high and prejudicial to intermodal carriers, to owner-operators that operate older equipment, and to oilfield carriers that frequently operate off-road.

(c). Infractions not reported. Infractions are fed into the MCMIS as scored against carriers only when entered by MCMIS trained officers. Frequently, urban violations, tickets and tow-aways are handled by local officials and although subject to report do not enter the MCMIS system. Similarly, local interstate operations that do not operate through scales or over the interstate system may have infractions and violations which are not entered or counted. Hence a system which relies on MCMIS alone does not have data integrity.

D. The inspection-based provisions of the NPRM are lacking in critical analysis and overstate the utility of reliance on roadside inspections

As set forth above, Commenters submit that FMCSA must consider the effect of use and publication of SMS data on shippers, brokers and carriers. Thus, the Agency cannot sidestep addressing the systemic flaws in SMS methodology discussed above.

Now, however, the Agency has brought forth a variant of SMS in this NPRM. The Agency insists that its SFD proposal is very different from SMS. Although Commenters believe the asserted differences from SMS are overstated, it is remarkable how little data or analysis has been presented to support what differences may exist. Unlike SMS peer groupings and percentile rankings set for alerts, which have been subject to more than seven years of study, this NPRM is supported by a single study of carrier performance data that is five years old. Without further analysis or an ANPRM, it asserts that the 2011 study – and the arbitrary setting of new peer groupings and higher thresholds for adverse safety fitness findings – can somehow be used to efficiently assess more carriers.

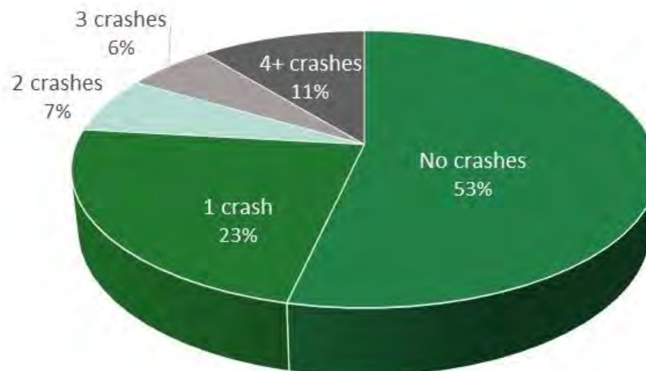
The sole support for the Agency's use of raw number absolute thresholds at the 96th and 99th percentile ranking is its analysis of 2011 data, which concluded that carriers that would have failed two BASICs in an inspection-based review had an average of 8.28 crashes per 100 power units – or 4 times the national average – in the 12 months that followed their hypothetical rating.

Yet as noted above, data obtained from FMCSA through FOIA shows that 53% of those carriers had no crashes in the following 12 month period. Commenters submit that any proposed test

model that would place 53% of the subject carriers out of service as unfit based on profiling and percentile rankings is prima facie an invalid study. That is not a statistic that the Agency disclosed in the NPRM or its regulatory evaluation, nor is it a fact that can be ignored.

Figure 9 – Carriers that would have been found unfit by data alone in NPRM

Breakdown of carriers by number of crashes in following 12 months



Source: FMCSA data through FOIA request

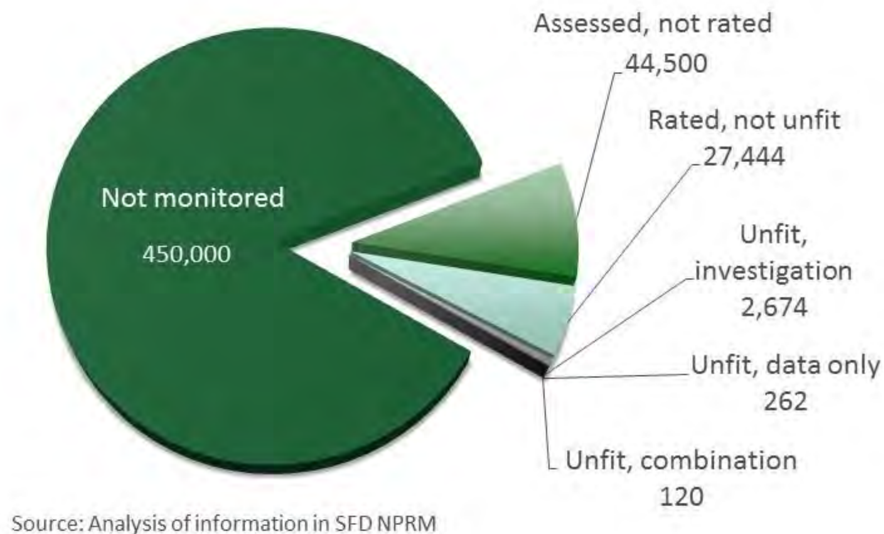
The above graph (**Figure 9**) reveals a repeated flaw in FMCSA's and Volpe's use of average group data to imply individual carrier safety profiles. As shown, 53% had no crashes, 23% had 1 crash and 13% had 2 or 3 crashes. Since the number of crashes made available in response to the FOIA have not been scrubbed for preventability, it is quite possible that none of the carriers with fewer than three crashes, and that would have been placed out of service under the proposal for inspection-based "unfits," had any preventable accidents in the subsequent 12 months.

Each of the systemic flaws in SMS methodology as shown above is necessarily present in the Agency's proposed use of similar roadside inspection data for SFDs. Moreover, by the Agency's own admission, roadside data using the proposed raw scores would only rate 262 carriers as unfit. An additional 120 carriers would have been declared unfit using a combination of roadside data and investigation. That a total of 382 carriers could be declared unfit by FMCSA utilizing SMS methodology and roadside inspections is a revealing and meager outcome for a methodology the Agency consistently has touted as fit for use by the shipping public in selecting more than 75,000 carriers.

To inflate the utility of the proposed new SFD, the Agency states that streamlined investigations replacing compliance reviews would produce 2,674 unfit findings in addition to the above 382 carriers – for a net of about 1,700 more unfit carriers than today – without considering how many of those carriers could continue operations on appeal. (A more detailed critique of the Agency's proposed investigation-based methodology is presented in part IV.E below.) The Agency also claims credit for an additional 27,440 carriers that it says could be monitored but not declared unfit under roadside methodology and 44,500 carriers that would be "assessed" but not rated.

All told, the number of carriers "rated or assessed" is approximately 75,000, and roadside inspections alone are shown to be less ultimately effective than has been touted by the Agency since the days of SafeStat when it alleged that the same 75,000 carriers were prioritized for intervention. The following chart (**Figure 10**) shows that at the end of the day 83% of the carriers the Agency regulates are not monitored or assessed in any respect by the proposed new SFD regulation.

Figure 10 – Limited coverage by NPRM of total carrier population



Commenters submit that based upon their presentation here, it is time to start all over and look at a different method of not only monitoring and policing motor carriers, but also assisting and working with *all* carriers to ensure compliance. See Part IV.I below.

Moreover, as shown above, any marginal returns on use of roadside inspections demonstrated by the Agency's analysis of 2011 data cannot be imputed to the current industry profile, much less the future. In its 2011 study, FMCSA relies heavily on roadside data involving Unsafe Driving and HOS to profile unfit carriers. But mandatory electronic logging devices (ELDs) and a pending rulemaking to mandate speed limiters on heavy vehicles will substantially reduce the number of roadside infractions and the number of inspections with violations in those BASICs, thus reducing the volume of data FMCSA's model depends on. As the numbers of infractions are reduced, it would be idle speculation to think that the raw numbers set by the Agency would capture more carriers, or that if the Agency were to reset the raw numbers at updated percentiles it would fare any better in capturing carriers which were at risk of future crashes.

Applying the agency's "absolute" raw numbers established in the NPRM to February and March 2016 data, Commenters determined the proposed use of SMS data and fixed "absolute" numbers would find only 17 carriers "unfit" based on roadside data in the first month and only two additional carriers unfit in the second month. (See ***Vise Affidavit***.)

In order to make any significant use of "absolute raw scores" in the coming era of ELDs, speed limiters and other technical innovations, the Agency repeatedly would have to recalibrate the "raw scores" through rulemaking (as it recognizes) to justify new enforcement thresholds. Even if accuracy could be improved by repeated recalibrations, the results likely would not be worth the expense.

E. FMCSA's proposed investigation-based SFD method marks a radical change in philosophy by judging carriers on factors not reasonably within management's control

As discussed in Part II above, the longstanding purpose of the compliance review (CR) has been to assess the safety management systems, policies, procedures and general culture of the motor carrier. In general, unsatisfactory and conditional ratings have been based on activities that were within management's direct control or ability to monitor through reasonable audit procedures. For example, management is appropriately accountable for the hours-of-service compliance of its drivers because supporting documents and dispatch records allow the carrier to verify records of duty status and educate, discipline or terminate drivers if they repeatedly violate the regulations.

The current SFD process involves assessing acute and critical violations. Acute violations "are those identified … where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier." Critical violations under the current rating system "are indicative of breakdowns in a carrier's management controls." (See Appendix B to current 49 CFR Part 385). FMCSA assesses these violations within six general areas called "factors": General, driver, operational, vehicle, hazardous materials and accident.

The Coalition objects to FMCSA's proposed approach to investigation-based SFDs for three principal reasons. First, investigations appear to be fundamentally different from CRs and are more about making it easier to find a carrier unfit than about assessing a carrier's safety management process. Second, the Agency is "considering" certain proposed critical violations that, like speeding, are not appropriate violations on which to assess management's safety posture. Finally, FMCSA is vague about the implementation of the investigation-based SFDs and apparently would continue practices that are both unclear and uncertain.

As is further discussed in Part V.G below, Commenters' concerns about the proposed investigation-based SFD procedures led them to submit follow-up questions to the Agency on May 9. Responses to these questions were not posted until the morning of May 23, the deadline for these Comments. Although the responses do not appear at first glance to ameliorate any of Commenters' concerns, the Coalition reserves the right to address those responses in the reply phase of this proceeding.

1. Investigations appear to be fundamentally different from CRs and depart from their longstanding objective. To some extent, FMCSA's proposed investigation-based SFD process would follow the current CR structure, by assessing a revised list of acute and critical violations across the SMS BASICs instead of the factors. However, the proposed new investigation-based SFD includes two major elements that represent fundamental departures from today's compliance review and run counter to the notion that the purpose of a CR is to assess a carrier's overall safety posture.

(a) Reduction in critical violations required to fail a BASIC. Without an explanation as to the reason, FMCSA is proposing to tighten the standard for critical violations by reducing the number needed to fail a BASIC. As is generally the case today, a critical violation is counted only if it is found in at least 10% of records examined and occurs more than once. (Under today's procedures, there are some violations that are deemed critical even if not appearing in 10% of records examined.) However, it takes two critical violations meeting those standards to fail a factor in a CR today. Under the NPRM, a carrier would fail with just one critical violation meeting those standards. See 81 Fed. Reg. at 3580.

This "one strike" methodology certainly will make it easier to find a carrier unfit, but it is not consistent with the Agency's ultimate objective of concluding that carrier management has a pattern of neglect warranting being assessed a critical violation. The one strike rule will, the Commenters submit, result in the abandonment of any requirement that a pattern of neglect or malfeasance must be a predicate for terminating the operation of a small business.

(b) Apparent inclusion of violations within the Unsafe Driving BASIC within an investigation. As will be discussed below, it is not clear precisely what information auditors will be reviewing if the SFD NPRM becomes effective. Today, there are two violations listed in Appendix B of Part 385 as critical violations that are considered to be Unsafe Driving BASIC violations under SMS:

(1) 392.2 – Operating a motor vehicle not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated; and
(2) 392.6 – Scheduling a run which would necessitate the vehicle being operated at speeds in exceed of those prescribed

While FMCSA proposes to retain both of these critical violations in the new Appendix B, it is our understanding that 392.2 violations do not factor into the CR rating methodology today but rather are merely noted in audit reports. In fact, we understand that the Capri software used by auditors does not currently even allow for 392.2 violations to be counted in a CR safety rating calculation.

Given that FMCSA is affirmatively proposing to include the Unsafe Driving BASIC in its investigation-based SFD method, we must assume that the Agency now proposes to consider 392.2 violations in SFDs. If so, this represents both a fundamental change in philosophy and a potential trump card for the Agency in failing carriers that have failed another BASIC either in investigations or in roadside inspections.

In a sense, using Unsafe Driving violations in an investigation represents double jeopardy in that a carrier might not exceed a 96th percentile failure standard in an inspection-based review but then fail the Unsafe Driving BASIC in an investigation based on a far lower failure threshold. Indeed, it would appear that the Unsafe Driving BASIC is the only BASIC that would use the exact same data in both inspections and investigations.

The Commenters submit that unless a pattern of violations is shown in which management is requiring or permitting drivers to speed or commit traffic violations, these infractions are driver-specific, not company-specific. Counting traffic infractions based on driver profiling to downgrade a safety rating is a major change in regulation that would merely shift noncompliant drivers from a carrier found unfit to a different employer. The result is economic ruin for one carrier and simply passing the risk of an accident on to anyone who hires those drivers. If the Agency desires to take action on driver-specific violations, then it needs to release to the public the Driver SMS scoring system to ensure that the motor carrier is fully knowledgeable about individual drivers' Unsafe Driving BASIC performance.

2. FMCSA is considering additional new critical and acute violations that are not appropriate in assessments of carriers' safety management culture. FMCSA has officially proposed a certain list of critical and acute violations that were used in its RE, but says it "is also considering whether to include the following violations and seeks comment specifically on these violations." 81 Fed. Reg. at 3582. In the Commenters' view, the reasonable interpretation of this statement is that FMCSA tentatively plans to include these violations in the final rule unless it is persuaded otherwise.

As with the 392.2 violations, the list of potential new critical and acute violations raises further concerns about the Agency's direction with investigations. Violations that should not be counted as critical violations against carriers include:

- 392.16 – A commercial motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself/herself with the seat belt assembly
- 392.80(a) – No driver shall engage in texting while driving
- 392.82(a)(1) – No driver shall use a hand-held mobile telephone while driving a commercial motor vehicle

The Commenters fully support the notion that motor carriers' policies, procedures, training and discipline should oppose these practices unequivocally. But ultimately there are no controls a motor carrier can implement to prevent drivers from committing these violations until they occur.

3. FMCSA should be clear as to how investigations will be conducted. The Coalition is well aware that the Agency's standard operating procedure today is to keep its audit procedures as closely held as possible. In Commenters' view, however, fairness dictates that FMCSA's investigations follow prescribed rules that carriers can rely on.

The Agency has made public the electronic version of the Field Operations Training Manual (eFOTM) that contains the specific protocols to be followed during a compliance review that leads to a safety rating. FMCSA also developed a revised eFOTM in relation to CSA. This document specifically outlines compliance review procedures, including sample selection in light of CSA.

In this NPRM, an investigation can lead to an unfit SFD, and understanding the proposal requires information on the Agency's intended parameters, procedures and techniques. Therefore, the Commenters submit that a proposed eFOTM for investigation-based SFDs is an essential component of this NPRM and needs to be included in a Supplemental Notice of Proposed Rulemaking (SNPRM), which is needed for numerous other reasons in any case.

In such an SNPRM, the Commenters would argue that at least one major change to today's practice is warranted. It has long been FMCSA's goal to maximize its own discretion. For example, it is well known that when auditors select records to examine, their selection is far from random but rather is targeted to drivers and vehicles that the Agency already knows have had a history of previous violations. Commenters submit that a random audit is essential to the goal of determining whether the carrier is engaged in a pattern of noncompliance for which the carrier may be found unfit. With a new SFD process being proposed, the Agency should adopt and affirm that "10% of records examined" means "10% of records randomly selected." This can easily be accomplished by the auditor using random generation software when developing audit selection lists.

Similarly, with the apparent introduction of the Unsafe Driving BASIC as a new element in investigation scoring, the Commenters need explanation as to what constitutes "a record" in the context of this BASIC. As noted earlier, 392.2 violations are already in MCMIS. Unlike RODS and supporting documents, driver qualification files or maintenance records, there is nothing for FMCSA to audit in Unsafe Driving; a violation either exists or it doesn't. And FMCSA does not need any information from a carrier; the data is already there for its perusal. Without regulations barring the practice, the Commenters see nothing that would prohibit the Agency from selecting only carriers that would fail Unsafe Driving to target for investigations in other BASICs.

Also, the NPRM is not clear as to which violations would count in an investigation. As noted above, FMCSA has suggested that it *might* decide to include *federal* texting, seat belt or hand-held mobile phone infractions as critical violations, although it has not formally proposed to do so in the NPRM. And this problem is not limited to those proposal additional critical violations. State violations included in 49 CFR 392.2 also may include improper lane changes and following too close, for example, and varying state and local enforcement priorities subject drivers and carriers to disparate treatment.

F. The proposed rule violates fundamental tenets of the Administrative Procedure Act and related federal statutes

The NPRM pays only lip service to three pillars of statutory administrative law at the federal level. These are the Administrative Procedure Act, Pub. L. 79-404 (1946) (APA), the Regulatory Flexibility Act of 1980, Pub. L. 96-534 (RFA), and Section 515 of Pub.L. 106-554 (2001), commonly known as the Data Quality Act (DQA).

The Agency does recognize in this docket that the APA requires adequate public notice and full opportunity for public comment on the substantive regulations proposed here; 5 U.S.C. § 553(b), (c). Rules adopted by the Agency must be accompanied by a "statement of their basis and purpose" after all "relevant matter presented" in comments has been duly considered. Id. A rule cannot withstand judicial review under 5 U.S.C. § 706(2) if it is found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." These Comments show elsewhere that the present NPRM is proceeding contrary to recently enacted law (i.e., the FAST Act), has not been the subject of adequate notice, and proposes arbitrary processes for shutting down motor carriers merely because their scores under a flawed statistical methodology (SMS) resemble the scores of *other carriers* that have above-average crash rates.

Another hallmark of capriciousness in this docket is the claim that an ANPRM was unnecessary under the FAST Act because FMCSA has previously considered input about SMS from shippers and brokers (81 Fed. Reg. at 3598-99). While it is true that members of this Coalition did submit extensive studies and other evidence impeaching SMS methodology in previous "rulemaking lite" dockets where aspects of SMS were presented to the public as a fait accompli, there is little if any indication in the current NPRM that the Agency genuinely considered any of that input. Now that the Agency acknowledges the necessity for full APA rulemaking on an SMS-based SFD methodology, that evidence is being re-submitted for the present docket (see ***Supplemental Documents, Parts C through J)*** along with updated studies and affidavits.

The second pillar of federal administrative law governing this proceeding is RFA. As pertinent here and recognized at least ritualistically by the Agency (81 Fed. Reg. at 3595-97), this statute

requires consideration of (1) the impact of the proposed rule on “small entities,” and (2) “any significant alternatives to the proposed rule which minimize … impacts on small entities.” As Commenters show elsewhere (and as the Agency recognizes, id.), the great majority of motor carriers are small business enterprises under a definition used by SBA. Moreover, 42% of the regulated carriers that would be “evaluated for an SFD” have 5 or fewer power units (81 Fed. Reg. at 3573). The proposed rule makes no provision for educating or even monitoring these small carriers until their numbers of inspections cross an arbitrary threshold, at which time they may be quickly put out of business based on statistics alone.

These Commenters submit that missing from the Agency’s analysis is any consideration of (1) regulatory compliance costs, (2) the difficulty that many small carriers will face in finding legal and enforcement talent to prepare corrective action plans within the proposed fast-track shutdown schedules, and (3) the lack of leverage available for small carriers to avoid non-reviewable consent decrees or summary shutdowns. Moreover, the Agency’s RFA-required consideration of alternatives has been limited mostly to minor tweaks, such as small adjustments to percentile-based “failure” standards.

Nowhere in the NPRM does the Agency consider alternatives other than the use of dubious roadside data in making SFDs. In Part I of these Comments, these parties will submit a more viable and comprehensive plan for making an actual assessment of all regulated carriers on a biennial basis. As will be shown, this process would be based on tools already available to the Agency, could be self-funded by the Agency and/or the industry, and would eliminate bias against small carriers.

With regard to the DQA, Commenters submit that the SMS methodology underlying the proposed SFD rule has not been shown to meet the guidelines of this statute for data an agency disseminates for public use. Nor does this methodology satisfy the similar standard of *Daubert v. Merrill Dow Pharm., Inc.,* 509 U.S. 579 (1993) for admission of a study or data as evidence in a court of law. As shown elsewhere in these Comments, the SMS-based system now proposed for making SFDs is just a more convoluted form of the SafeStat system that the IG found in 2004 was afflicted with systemic flaws. As pointed out in Part IV.B above, Congress in the FAST Act

has agreed that data based on SMS percentiles is not currently fit for publication and has required its removal from the Agency's website.

G. The foregoing statutory shortcomings prevent the proposed rule from passing muster under standards of fairness and due process.

These Comments have demonstrated that the proposed rule is an amalgam of bad data and worse methodology. Much of the actual proposal is obscure. The clearly-stated portions are lacking in due process, and the claimed safety "benefits" are too small to justify the elements of fairness being sacrificed on the altar of administrative convenience. As such, the proposed rule not only falls short of specific APA, RFA and DQA standards but runs contrary to fundamental tenets of administrative due process.

1. The NPRM provides "notice" in name only. ***Exhibit I*** to these Comments is a list of 12 open issues on which the NPRM invites comment. Multiple options for a final rule are presented for each of these open issues.[4] While the Commenters do not fault the Agency for specifically requesting public input on identified issues, there are many other areas of ambiguity in the NPRM that are not similarly highlighted for comment by stakeholders. For example, the Agency does not make clear when "absolute" values would be set for the inspection-based "failure" percentiles chosen in the final rule. 81 Fed. Reg. at 3574.

Presumably these determinations would be made at or near the end of the rulemaking process, but no clues are given as to whether the values would be set retrospectively (using raw scores the Agency already would have in hand) or prospectively. As noted previously, the timing for release of such values could be highly significant at that juncture, depending on the pace at which ELDs and speed limiters would be coming on stream.

Similarly, the NPRM indicates that certain elements of the SMS-based scoring of inspection results will be issued as "guidance" rather than as part of the final rule – so that the contents of the guidance could be changed without rulemaking. These scoring elements will include, *but will*

[4] In an Appendix to these Comments, the Coalition provides its direct answers to the questions listed in ***Exhibit I***. In so doing, Commenters do not waive their objections to the NPRM as being impermissibly vague in terms of the APA's "adequate notice" requirements, as stated in this Part IV.G.1.

not necessarily be limited to, severity and time weightings for particular violations. 81 Fed. Reg. at 3586-87. The possibility that more than the weightings could be issued in this malleable fashion is clear from the Agency's statement of the publication process it will follow for "*any* elements of the proposed methodology" it decides to treat as guidance. Id. at 3587 (emphasis added).

Most recently, still more issues have been identified by the Commenters as hidden ambiguities in the NPRM. ***Exhibit J*** to these Comments reproduces 18 follow-up questions submitted by the Commenters to the Agency on May 5, 2016 as part of an SBA Roundtable on the NPRM. These follow-up questions requested clarification of numerous aspects of the procedure for investigation-based fitness determinations under the proposed revision of Part 385 – including such questions as whether *all* violations of state and local laws would be considered "critical" for purposes of 49 CFR § 392.2, and the future role (if any) of vehicle out-of-service rates. As noted in Part IV.E above, we did not receive responses to these questions until the May 23 deadline for these Comments, and therefore reserve the right to address the Agency's responses during the reply comment phase.

But the greatest ambiguity of all – actually an outright contradiction – is the treatment of crash data in the NPRM. On one hand, the Agency belatedly acknowledged that only preventable crashes should be considered for purposes of "unfit" findings based on investigations. 81 Fed. Reg. at 3582. For other purposes in the NPRM, however, the Agency uses data on all crashes – preventable or non-preventable – in an effort to justify "unfit" findings based on roadside inspection results. If non-preventable crash data is not good enough for *making* "unfit" findings based on investigations, surely it is not good enough for *justifying* inspection-based "unfit" findings either.

When all of the open issues in the NPRM are considered in the aggregate (whether or not they are acknowledged by the Agency), there is hardly an element of the proposed SFD methodology that is not subject to change if and when a final rule is issued. "Failure" percentiles, the "absolute" values under those percentiles, the SEGs, the time and severity weightings, the "acute" and "critical" violations for investigation-based SFDs, the role of non-preventable

crashes in the SFD process – all of these and more are in play. Here the Agency is trying to give itself much more leeway than the D.C. Circuit allowed a predecessor agency in adjusting "technical elements" of a "sampling procedure" for motor carrier safety audits without rulemaking. Compare *American Trucking Associations, Inc. v. U.S. DOT*, 166 F.3d 374, 378-80, on which the Agency tried to rely in the NPRM (81 Fed. Reg. at 3567 n.30, 31).

The open-ended nature of the NPRM here implicates a large body of APA case law under which a final rule must be a "logical outgrowth" of a proposed rule in order to avoid a failure of notice in the NPRM. See, e.g., *CSX Transportation, Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009), in which the Court found that a final rule issued by the Surface Transportation Board was not a logical outgrowth of an NPRM that "requested comments on no particular issue at all." Id. at 1082.

Because the Agency here did not follow the FAST Act requirement for an ANPRM or a reg-neg process in which the issues could have been narrowed and sharpened, the Commenters suggest that the next best thing might be to issue an SNPRM once the Agency has a more specific proposed rule in mind. To avoid further waste of public and private resources, however, an SNPRM should not be launched unless and until some form of the current SFD proposal survives the SMS review/reform process specified in the FAST Act.

2. Even where Agency objectives are relatively clear, they often violate due process.

a. Interplay of inspection-based and investigation-based procedures. One aspect of the proposed SFD methodology is all too clear. This is the proposal to shut down carriers with "unfit" findings based in whole or in part on roadside inspection data, whether they have had a crash or not. The NPRM justifies these shutdowns on the basis that *average* crash rates for these carriers are higher than the nationwide average crash rate. 81 Fed. Reg. at 3584. The reality behind these averages was detailed above, in parts IV.C and IV.D of these Comments. Specifically, the data obtained by the Commenters from the Agency under FOIA showed that 56% of the carriers identified in the NPRM (id.) as being unfit based in whole or in part on the inspection-based SFD method had *zero crashes* in the 12 months following their hypothetical

rating dates. In all likelihood, many more of these carriers had no *preventable crashes* during that same period, given the results of the Agency's own January 2015 study entitled "CRASH WEIGHTING ANALYSIS" (available at www.fmcsa.dot.gov/mission/policy/crash-weighting-analysis-full-report (last visited April 4, 2016)). That study analyzed 9,884 Police Accident Reports with usable data on causation on truck or bus accidents, and determined that only 3,856 (or 35.9 percent) identified the truck, the bus or its driver as the "critical reason" for the accident.

The hundreds of crash-free carriers targeted for shutdown under the proposed methodology are being sacrificed on the altar of administrative efficiency. They are to be shut down because their roadside inspection records – which likely are riddled with data quality defects as shown in parts IV.C and IV.D above – *resembled* those of carriers who did have crashes. This expedience may save the Agency the trouble of conducting "resource intensive" audits of these carriers (NPRM, 81 Fed. Reg. at 3569), but the result is the essence of guilt by association. Similar sacrifices in the name of efficiency also are proposed in the appeal process for investigation-based "unfit" ratings under Part 385. Earlier discussion (part IV.E, supra) has shown that the radically shortened appeal periods have the effect of foreclosing small carriers from legal challenges to such ratings, thus in most cases leaving them at the mercy of an Agency-dictated compliance agreement.

Another abuse of due process will result – as also shown in Part IV.E above – from a regulatory one-two punch. This scenario will face a carrier that fails one BASIC because of roadside inspection data and then faces a focused investigation aimed at finding a "critical" or "acute" violation under the proposed new version of Part 385. This hybrid process epitomizes the shift from an assessment of the intentions and priorities of carrier management regarding highway safety (the old Part 385 paradigm) to the search for violations by individual drivers despite the best efforts of management (the new paradigm).

b. Appeal procedures for unfit determinations. In addition, the radically shortened appeal periods in the proposed language for 49 CFR Part 385.15 through 385.18 have the effect of foreclosing small carriers from legal challenges to such ratings, thus in most cases leaving them

at the mercy of an Agency-dictated compliance agreement. A section-by-section analysis of these appeal provisions will make their lack of fairness apparent.

Under proposed Section 385.15, carriers hit with a "proposed unfit" finding will be able to petition for administrative review based on material error in the Agency's finding, as is also permitted under the current version of Part 385. There are major differences, however, in the time frames established under the current and proposed rule. The new rule *requires* such a petition within 15 days of the "proposed unfit" finding, whereas the current rule allows more time for the filing if the carrier is willing to risk having a "conditional" safety rating become effective before action on the petition.

Because administrative review petitions are premised on material error, thorough factual investigation and legal analysis of the Agency's proposed action will be necessary. It will be difficult or impossible for many carriers, especially small ones, to analyze the "proposed unfit" finding and find appropriate professional assistance to articulate material error, all within 15 days. Moreover, there is no assurance that the Agency will act on such a petition before the "proposed unfit" finding becomes final 60 days – 45 days for hazmat and passenger carriers – after the finding was issued.

Proposed section 385.16 is a new provision, under which the carrier can request review of a "proposed unfit" finding by submitting "valid" data from inspections that (i) were conducted during the "assessment period" for such a finding, but (ii) were not considered by the Agency is issuing the finding. Such requests, however, must be submitted within 20 days – 10 days in the case of passenger or hazmat carriers – after issuance of the "proposed unfit" finding.

Notably, such requests will not be entertained if, for example, the additional data is submitted for a "good" month immediately after the end of the rolling two-year "assessment period," or if the petitioner shows that a "bad" month dropping off at the beginning of the "assessment period" brings the carrier's raw scores back below the "failure" threshold. While the due-process problems afflicting the proposed use of inspection data for SFDs would be somewhat ameliorated if two consecutive months of 24-month scores above the "failure" threshold were

required, that is not the purpose or the effect of proposed section 385.16. In all likelihood, therefore, this section will rarely serve as a lifeline for a carrier under the Part 385 revisions.

Proposed section 385.17 bears a superficial resemblance to the current rule with the same number, but is vastly more prejudicial to the carrier. The current section 385.17 allows carriers "at any time" to request changes in a "conditional" or "unsatisfactory" rating based upon corrective action. By contrast, the language of proposed new section 385.17 allows a "request to defer final unfit safety fitness determination and to operate under a compliance agreement" – but only if filed within 30 days – 15 days in the case of a hazmat or passenger carrier – after the "proposed unfit" finding.

The deferral request under the proposed rule must include evidence that it "has taken necessary actions to correct its deficiencies." This evidence may be difficult to assemble within 30 days if, for example, the issue is HOS compliance for which the Agency frequently has required 30-day log audits to show corrective action under the current rule. Even so, the absence of alternative avenues of appeal with reasonable time frames, coupled with the loss of the opportunity for a carrier to limp along under a "conditional" safety rating while it works to improve its safety management, will eviscerate the carrier's negotiating position with respect to the required "compliance agreement."

This loss of leverage likely will leave many carriers – especially small ones – with no choice but to proceed under proposed section 385.17, promise corrective actions that may not turn out to be realistic, and accept whatever compliance agreement is dictated by the Agency. As noted in Section IV.A of these Comments, the compliance agreement may even require adherence to SMS percentile thresholds that the FAST Act forbids the Agency to impose directly on the motor carrier industry.

The Commenters submit that the process FMCSA envisions represents a major departure from "fit to operate is fit to use." In publicly identifying carriers operating under compliance agreements, the Agency essentially is saying that the carrier has been convicted as unfit but is on probation.

The final "option" offered to a "proposed unfit" carrier under new section 385.18 would be no real option at all. The carrier could let its "unfit" status become final and then apply for a new registration. The application would have to be accompanied by a corrective action plan. The new registration would be granted (after an unspecified waiting period) only if the corrective action plan "is acceptable" and the carrier enters into a compliance agreement under new section 385.17. Most carriers, however, would find it difficult to resume operations because the "final unfit" finding would have caused them to lose shippers, equipment lessors, drivers and capital within days if not hours of being shut down.

Other potentially prejudicial features of the appeal avenues under proposed Part 385 include the confusingly inconsistent time frames for different types of appeals as described above, the absence of even brief automatic stays for "proposed unfit" findings despite the accelerated appeal deadlines, and the absence of administrative review for denials of "missing record" requests under new section 385.16.

Finally, it is unclear to the Commenters what appeals process, if any, is available to a carrier that has been presented with an unreasonable "take-it-or-leave-it" compliance agreement. Today, if FMCSA approves a corrective action plan but declares that the carrier has not abided by it, the carrier may seek judicial review. The currently proposed language of 49 CFR § 385.17(j) appears to allow "limited administrative review" only for the Agency's refusal to enter into a compliance agreement, and is silent about any judicial review of alleged violations of such an agreement.

3. Why is significant due process being sacrificed for minuscule results? Another fundamental issue that FMCSA has ignored is whether any of the alleged additional safety benefits of the proposed SFD procedure will justify the deprivations of administrative due process described above. The Coalition submits that whether this balancing test is applied to the inspection-based methodology or to the revised procedures for investigations, the costs in terms of fairness and due process far outweigh any benefits.

With regard to the new scoring procedures based on roadside inspections, the Agency projects that a total of 382 additional carriers would be found unfit due to inspection data in whole or in part. NPRM, 81 Fed. Reg. at 3584, Table 18. Based on our analysis the number of carriers that would be found unfit solely on the basis of roadside data is even fewer than FMCSA projects – assuming, of course, that FMCSA is serious in its declaration that failure standards are absolute and will not be frequently changed to ensure that more carriers fail. (See discussion under "Insufficient data" in part IV.C.1 above.)

Under current Part 385 procedures, auditing this small number of carriers (which are known to the Agency from inspection data in SMS) would hardly place a strain on the resources of the Agency and its state partners. After all, they were able to conduct 17,000 compliance reviews (full and "focused") as recently as fiscal 2012, and as of fiscal 2015 were still conducting more than 12,000 annual compliance reviews on property carriers alone. NPRM, 81 Fed. Reg. at 3569, Table 5; see also Motor Carrier Safety Progress Report, https://www.fmcsa.dot.gov/safety/data-and-statistics/motor-carrier-safety-progress-report-december-31-2015. In light of the consequences of an unfit finding for carriers audited by data alone, *a majority of which have been shown above to be crash-free* for a year after an unfit finding would have been made, such an approach appears unjustified – especially when the number of carriers shut down in this fashion is so small in relation to the hundreds of thousands of carriers in the Agency's regulatory universe.

Given the relatively small number of carriers *initially* affected by the inspection-based SFDs proposed in this docket, it is difficult to avoid asking whether a hidden agenda is driving these changes to SFD procedures. Is the Agency attempting to establish a precedent for future proposals to use flawed roadside inspection data and procedural short cuts against much larger numbers of crash-free carriers? The Coalition submits that now is the time to head off the APA violations and other bad precedents built into this NPRM.

H. FMCSA's regulatory evaluation is fatally deficient and cannot be used to justify moving forward with the NPRM

The 42-page Proposed Regulatory Evaluation (RE) provided as justification for the NPRM fails in numerous respects, including not accounting for critical cost elements; dubiously assuming that the analysis period – 2011 – is representative; mischaracterizing safety benefits; and failing to abide by Congressional prescriptions regarding regulatory evaluations in major proposed regulations. The latter deficiency is discussed in the analysis of Section 5202 of the FAST Act above in Section IV.B and is incorporated here by reference.

1. The RE fails to account for critical cost elements. FMCSA recognizes that compliance costs necessary to continue operating following a proposed unfit SFD is an appropriate cost to allocate, but it professes to have no data on which to base an estimate and, therefore, did not include a figure in the RE. The explanation for this omission possibly lies in the fact that FMCSA did not initially propose to recognize these costs as appropriately allocated, but the Office of Management and Budget insisted that the Agency do so in its pre-publication review. (See Executive Order 12866 and Congressional Review Requirements, February 12, 2016, www.regulations.gov, FMCSA-2015-0001-0059.) Regardless, FMCSA would have had the data it needed had it conducted an ANPRM as contemplated by the FAST Act.

Also, FMCSA assumes that drivers displaced by the additional carriers placed out of service will find jobs within 120 hours (i.e., three weeks) based largely on data regarding labor market growth from the Bureau of Labor Statistics. However, BLS forecasts have shown to be unreliable. For example, BLS forecasts in 2002 of the driver force in 2010 turned out to be off by 490,000 drivers. (See http://www.ccjdigital.com/journal-truck-gauge-10/, last accessed May 18, 2016). In addition, there is a major logical discrepancy between the assumption of a relatively quick job replacement and the projected safety effects of the proposed rule, which will be discussed below. Similar illogic exists between the Agency's dueling assumptions of healthy driver demand and continued flat driver wages in real terms.

Another glaring omission in the cost analysis is the failure to consider the costs of job displacement for any workers other than drivers. While it might be true that many motor carriers found unfit will have no employees other than drivers, clearly a significant number do have other

workers. And by the nature of those jobs – i.e., working at a fixed location rather than in a "mobile office" – individuals in non-driving jobs are not likely to find jobs nearly as quickly as drivers.

Perhaps the most devastating cost of all is the financial impact on the carriers found unfit – defaults on loans, repossession of equipment, personal bankruptcy of owners, etc. FMCSA might not consider these to be legitimate costs on the premise that these are just "bad actors," but under the National Transportation Policy the Agency is tasked with encouraging sound economic conditions in transportation; enabling efficient and well-managed carriers to earn adequate profits and attract capital; and maintaining a sound, safe and competitive privately owned motor carrier system.

The Agency cannot ignore the collateral damage its proposed rule would inflict on carriers with no crashes that would be found unfit in whole or part on based on inspection data, nor can it disregard the impact of "assuming" that high SMS scores reflect management's pattern of noncompliance and thus warrant such a severe sanction. There is no justification for imposing any of the above catastrophic consequences on the many carriers that have been shown in these Comments to be falsely depicted as "bad actors" by the Agency's bad methodology.

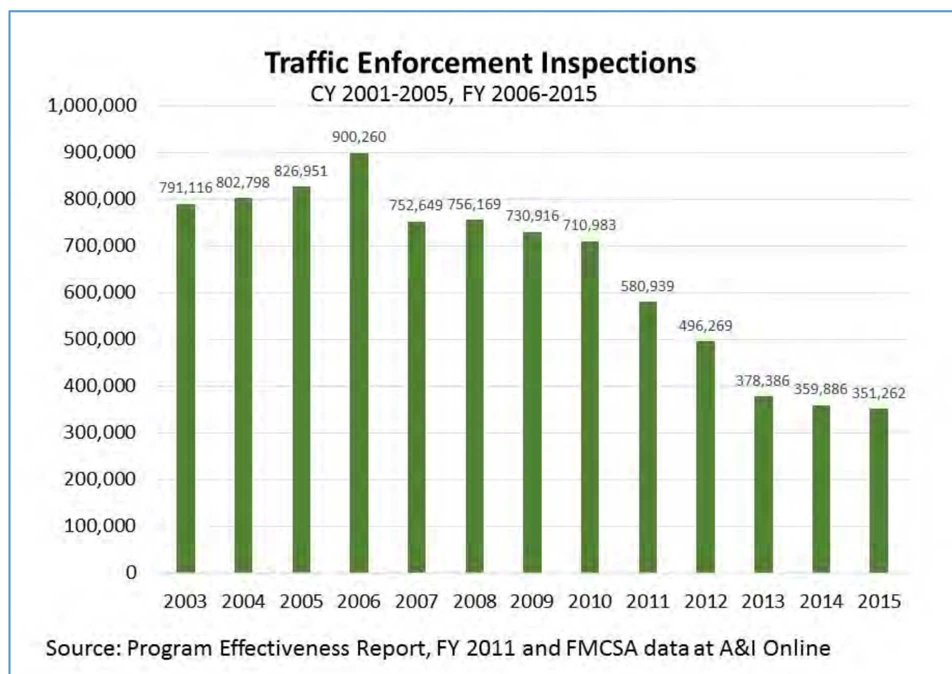
2. The assumption – without any apparent attempt to confirm – that 2011 data is representative of data from other years is highly suspect. FMCSA itself recognizes this as a fundamental question in a footnote on page 14 of the RE: "The basic assumption is that 2011 is a representative year and results from that year can be used to inform estimates of carrier performance."

FMCSA goes on to say that "it does not have to be the case that an individual carrier exhibits consistent performance from one period to the next in order for this assumption to hold." It argues that "as long as the overall level of performance of the population remains consistent, then the assumption holds." FMCSA concludes by saying that "Unless 2011 turns out to be an unrepresentative year as a whole, then the assumption holds and allows for inference as to the benefits of the rule."

But *is* 2011 representative? It is incumbent upon FMCSA to find out.

There is at least one respect in which 2011 clearly is not like today. The number of inspections following traffic enforcement stops (TE inspections) has been plummeting since 2006. (See http://fleetowner.com/safety/safety-inspections-after-traffic-stops-are-plummeting, last accessed May 18, 2016). As shown in the graph below (**Figure 11**), TE inspections in fiscal 2011 – a period that covers nine of the 12 months in FMCSA's review period – totaled 580,939, which already was down 35.5% from the peak in fiscal 2006. By fiscal 2015, which is the most recent full fiscal year, TE inspections had fallen to 351,262, or another 39.5%.

Figure 11 – Inspections feeding Unsafe Driving BASIC have plummeted



This large decrease is important for a variety of reasons, but in this context TE inspections are the only source for the data that feeds the Unsafe Driving BASIC. This alone is an important issue, but to the extent that reduction varies by state, it further adds to the inherent over-selection problem.

Moreover, by the time this NPRM is finalized, the enforcement landscape will look far different than 2011. For example, by the end of 2017 electronic logging devices (ELDs) will be mandatory, which certainly will bring substantial changes to the data feeding the HOS Compliance BASIC. And it is anticipated that speed limiters will be mandated for heavy vehicles, which could change Unsafe Driving data.

Given that (1) FMCSA has already excluded the Crash Indicator BASIC due to the preventability issue and the Controlled Substances and Alcohol BASIC due to lack of data and (2) the Driver Fitness BASIC already would be essentially a non-factor in inspection-based reviews, these major regulatory changes could undermine what credibility remains for this SFD method.

3. FMCSA's analysis of crash reduction ignores the ineffectiveness of its own model and the implications of the NPRM's radical shift in philosophy. Table 3 on page 15 of the RE (also found in the NPRM, 81 Fed. Reg. at 3593) shows the effect of the proposed SFD process on crashes relative to today's process. FMCSA concludes that 1,699 more carriers would have been found unfit in 2011 and there would have been 1,421 fewer crashes – 41 fatal, 508 injury and 872 tow-away. Table 11 on page 32 of the RE starts with data from Table 3, adjusts figures for presumed growth in the industry by 2017, and accounts for carriers that are ultimately placed out of service; the carriers that replace them; and the carriers that remain in service, either by successfully challenging a proposed unfit SFD or by accepting a compliance agreement. The bottom line is a net reduction of 359 crashes annually – 11 fatal, 128 injury and 220.

The Commenters are not in a position to take issue with the math, but there are at least two important flaws in FMCSA's analysis:

- The Agency's own data shows that using aggregate average crash rate data is not an effective or equitable way to maximize crash reduction; and
- The Agency's shift to an SFD process that relies more heavily on the actions of individual drivers undermines its assumptions about net benefits.

a. The Agency's own data shows that using aggregate average crash rate is not an effective or equitable way to maximize crash reduction. Especially in light of the data obtained the Commenters through FOIA, Table 3 of the RE exposes the arbitrary results of relying on average crash rates to drive regulatory decisions. FMCSA focuses on the crash rate of the 1,699 additional carriers that it says would be found unfit based had the proposed SFD process been in place in 2011. But what the table really shows is merely that taking large numbers of trucks off the road reduces crashes involving large trucks.

On a net basis, the proposed SFD would identify 31,072 additional power units operated by unfit carriers than the current SFD. At an average rate of 4.57 crashes per 100 power units that means 1,421 fewer crashes. FMCSA characterizes this as a net gain relative to the proposed SFD, but the reality is that taking so much capacity off the road would substantially reduce crashes in any event. For example, randomly picking X number of carriers representing 31,072 additional power units should cut 662 crashes relative to today's SFD, assuming an average crash rate of 2.13.

While an average crash rate of 4.57 would save another 759 crashes, the data FMCSA relied on for its analysis indicates that the absolute number of crashes reduced is not especially impressive. Given that 56% of all the carriers that FMCSA says would have failed in whole or part based on roadside inspection data had zero crashes in the following 12 months, it is abundantly clear that SMS methodology is ineffective in isolating the carriers that have crashes.

Indeed, if FMCSA's true goal is to reduce crashes, then presumably it would target individual carriers based on their own crash rates. By its own admission, the Agency does not propose to do this because it recognizes that it cannot fairly judge carriers based on raw crash data due to lack of information on the preventability of those crashes. The consequences of the proposed SFD are even worse, however. Because an inaccurate and unfair SMS methodology would be used to profile carriers, a large percentage of the carriers FMCSA has targeted for unfit SFDs would otherwise have no crashes or, in all likelihood, no preventable crashes.

b. The Agency's shift to an SFD process that relies more heavily on the actions of individual drivers undermines its assumptions about net benefits. Throughout the RE, FMCSA implicitly assumes that crash rate is a function of the carrier without regard to the profile of its driver work force. For example, on page 30 the Agency discusses the 16.1% of carriers it assumes will ultimately be put out of business following a proposed unfit SFD. It calls "conservative" its estimate that the carriers that replace this capacity will be 52.8% better than the out-of-service carriers based on an average crash rate of 2.13.

That 16.1% represents 5,002 power units and at least 5,002 drivers, and FMCSA presumes that the average driver will get a new job within three weeks. So the unfit carriers are gone, but their

drivers are still around, FMCSA assumes. Nor does FMCSA assume any deterioration in performance among the carriers that hire those drivers.

FMCSA's analysis demonstrates that it does not grasp the implications of what it is doing in what is truly a radical shift in enforcement philosophy. With the introduction of moving violations into not only the inspection-based SFD method but also the investigation-based method, FMCSA is abandoning what has been a core principle of SFDs: that carriers should be judged on their management controls. Under the NPRM, many of the carriers the Agency will find unfit will suffer that fate due to driver actions beyond the carriers' reasonable control. And once those drivers move on to other carriers, the chances are great that those carriers' crash rates will rise.

The Commenters certainly are not in a position to estimate the impact of this dynamic, but we do note how sensitive the cost-benefit analysis is to even tiny changes in assumptions. The vast majority of the proposed rule's benefits flow from a large recent escalation in the assumed value of a statistical life (VSL) – a multiplier used by DOT modal agencies to calculate safety benefits of proposed regulations. The annualized average cost of a single fatal crash attributable to VSL is now said to be more than $11.5 million – more than three times what it was in 2008.

In sum, FMCSA has presented an RE that inflates safety benefits and ignores considerable costs, and the Agency appears to be unable to ascertain accurate figures for either.

I. Because of the fatal deficiencies carried forward into the current NPRM from discredited SMS methodology, it is time for the Agency to consider alternative proposals for a more comprehensive and credible SFD process.

Clearly, the Agency has not met its cost-benefit burden. The proposed SFD process is ineffective, could not achieve the Congressional mandate of measuring all carriers, and even at the proposed minimal returns would have an adverse impact on small businesses found unfit without any evaluation of management's ability to comply.

In this regard, one of the requirements of the APA is that federal agencies must consider alternatives to their proposed rules. In the context of the present NPRM, FMCSA has done nothing more (as noted earlier) than consider two slightly different sets of percentiles for use in

the inspection-based SFD method. See NPRM, 81 Fed. Reg. at 3574. (FMCSA claims that it is reviewing four options, but in reality it is two options: $95^{th}/98^{th}$ percentile-equivalent failure standards, depending on the BASIC or (2) the preferred option, $96^{th}/99^{th}$ percentile-equivalent failure standards.) Given the minor differences in these sets and the fact that the inspection-based SFD method results in so few unfit SFDs, the two options FMCSA presents could hardly be characterized fairly as alternatives.

Given that SMS methodology, as has been shown above and elsewhere, is chronically flawed and could never be effective or equitable for overseeing small motor carriers, FMCSA needs to consider an alternative that does not rely on SMS methodology at all – even once corrected following the National Academies study required by the FAST Act.

Any alternative to the NPRM should start with the objective of meeting the requirement in SAFETEA-LU that FMCSA devise a system for rating all carriers. At most, FMCSA's proposal assesses approximately 75,000 carriers, and most of those are not even subject to a potential SFD based on roadside data. With the exception of the occasional roadside inspection, 450,000 active carriers – 83% of the industry – are essentially left unmonitored.

Clearly, roadside inspections will never measure the vast majority of small carriers. Even though small carriers are inspected more often than large carriers, the average number of inspections over 24 months for interstate carriers with 1 to 4 power units is 1.77 – less than one inspection per year. (See **Figure 8** in Part 1V.C, supra**.)** While this ratio presumably would be higher if one looks only at over-the-road carriers, inspections are still far too infrequent to serve as essentially the sole means of enforcement and oversight.

These Commenters submit that what is needed is a periodic review of all carriers. While a full-blown compliance review leading to an unsatisfactory finding is detailed and cumbersome, the Agency could fulfill its stated goal of "progressive intervention" by designing an electronic, or "desktop," audit procedure patterned after the new entrant safety audit. This procedure would allow the maximum focused use of the auditor's time by requesting production of documents to verify each operator's continuing compliance.

To ensure that every carrier is assessed, FMCSA could tie these reviews to the biennial updates of carrier profile information currently known as MCS-150. Of course, additional reviews would be conducted if deemed necessary due to the same types of circumstances that might trigger a compliance review today.

The Coalition envisions a process whereby carriers would be given, say, 48 hours' notice to provide electronically such focused information as the auditor deemed pertinent after examining the carrier's MCS-150 and roadside performance. Such information could include individual driver qualification files; logs and backup documents for specified drivers; equipment maintenance records for specific drivers; drug and alcohol testing reports, etc. If no deficiencies are found and barring any other triggering events, the carrier would be reviewed again in two years. Carriers with deficiencies would be prioritized for follow-ups and compliance reviews under current procedures as the facts warrant.

In addition to ensuring a periodic monitoring of all carriers, this process would be valuable in augmenting and verifying the carrier profile information available to FMCSA through the MCS-150 and the Performance and Registration Information Systems Management (PRISM) program.

The Coalition recognizes that this proposed system comes at a cost. Reviewing 525,000 carriers every two years at an estimated cost of $300 for each audit would run about $79 million a year. (See ***Gobbell Affidavit.***) However, the Commenters submit that this process or something like it is the only way in which FMCSA can hope to gain visibility to all the carriers it is tasked with overseeing. Reviews could be conducted by federal or state employees or by independent contractors and paid for through a modest annual or biennial filing fee. Id.

On April 7, 2016, Joe DeLorenzo, head of enforcement and compliance for FMCSA, stated that the Agency would be "concentrating more on roadside inspection and violation data rather than upon on-site compliance reviews." That is really the heart of the issue. Roadside inspection data – an inherent part of CSA/SMS methodology – is insufficient, inadequate and fatally flawed. It is time to think outside the box, and the agency admits roadside inspections alone can be used to

identify fewer than 300 "bad actors." The system we propose is cost-effective, consistent with Congress' mandate and allows actual review of all operators of commercial motor vehicles in interstate commerce.

V. Recommendations

Based on the foregoing, the Coalition recommends that FMCSA:

1. Affirm that the Agency is solely responsible for making an SFD and that a carrier which is licensed, authorized and insured and which has not been placed out of service or assigned an ultimate safety fitness determination of unsatisfactory or unfit is safe to operate and safe to use.

2. Recognize that SMS methodology is an internal tool for use of the Agency only and that no publication of SMS methodology or pejorative branding of carriers should be made public or promoted as being intended or fit for use by the shipping public in carrier selection.

3. Abandon use of roadside inspections, peer groups, weighted infractions, percentile rankings or raw scores converted from percentile rankings as an accurate predictor of individual carrier performance.

4. Satisfy Congress' directive that all carriers be assigned a safety rating by validating through the new carrier audit and biennial desktop audits that carriers are not requiring or permitting violation of FMCSA regulations and are hence authorized to "continue to operate."

5. Fund the biennial audit cost through a $200 per year filing fee on each regulated carrier.

6. Use the results of the biennial audit as a first step in progressive monitoring of carriers together with other data accumulated by the Agency to determine which carriers need compliance reviews.

7. Focus compliance review on carrier management and corrective actions taken to ensure compliance for safety, not acute and critical violations committed by negligence of past drivers. Surveys of carrier performance should be based on random data, not investigations that target profiled noncompliant drivers.

8. Do not adopt 49 CFR § 385.18 but retain current provisions of §§ 385.15 and 385.17 with current time limits and administrative procedures.

9. Before proceeding with increased emphasis on roadside inspections involving the HOS and Unsafe Driving BASICs, recognize that radical changes in those BASICs will occur with ELD and speed limiter mandates resulting in compression of scores in HOS and Unsafe Driving, which will adversely affect the marginal utility of the system.

Respectfully submitted for the Coalition by:

Henry E. Seaton
SEATON & HUSK, L.P.
2240 Gallows Road
Vienna, VA 22182
Telephone: 703.573.0700
Fax: 703.573.9786
heseaton@aol.com

Mark J. Andrews
STRASBURGER & PRICE, LLP
1025 Connecticut Avenue, N.W., Suite 717
Washington, DC 20036
Telephone: 202.742.8601
Fax: 202.742.8691
mark.andrews@strasburger.com

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